

The Bible and LAW

OCCASIONAL PAPERS NO. 3

**COUNCIL OF MENNONITE SEMINARIES
INSTITUTE OF MENNONITE STUDIES**

Anabaptist Mennonite Biblical Seminary

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THE BIBLE AND LAW

Willard M. Swartley, Editor

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INTRODUCTION

This issue of *Occasional Papers* makes available the major papers presented at the Bible and Law Conference sponsored by the Institute of Mennonite Studies on the campus of the Associated Mennonite Biblical Seminaries, July 24-26, 1981. The conference was occasioned by the seminal work of Millard Lind and John Toews on the function of law in the Old and New Testaments respectively.

In order to set this biblical work within the context of larger perspectives and concerns, we invited papers also from Conrad Brunk on "Tensions between Law and Morality" and from Thomas Finger on "The Function of Law in Reformation Theologies." We had also anticipated a keynote address from Ed Gaffney, Professor of Constitutional Law at Notre Dame, on "The History of Law and Its Influence on Western Society." Because of several emergencies Dr. Gaffney was not able to accept the topic; we were fortunate to have William Hawk graciously agree to present a paper upon very short notice. His paper is included in this publication.

In addition to these five scholarly presentations, the conference featured three separate sets of five panelists each responding to "How I Hear It and the Issues We Face." These panelists came from various life-contexts showing different relationships to and involvements in law. Of the seventy-one persons attending the conference, thirteen were lawyers; one was a practicing judge and another, having served formerly as a judge, worked as a judicial fellow for the United States Supreme Court. On one of the three panels the five panelists represented five different types of Mennonite involvement with the law. One

panelist spoke of *using* the law to protect his own newspaper's business rights of free speech, thus protecting a moral principle. A second spoke of *resisting* the tax law to oppose the immorality of the USA defense budget. A third described his *refraining* from the use of the law to collect debts. A fourth spoke of his work in developing *alternatives* with the legal process for victim-offender reconciliation. And a fifth described her *use* of the legal process to protect the rights of those who have no voice in society. Each person claimed that his/her relationship to the law rested on moral considerations.

No longer can it be said that Mennonites have nothing to do with law. In various ways Mennonites are deeply involved in legal issues and structures. Within this context Millard Lind presented the rationale for the conference. As Mennonites we need to understand the biblical view of law in order to guide our own decisions regarding the use of law. Lind and Toews argued that both the Old and New Testaments regard law positively provided, however, that law is understood to be the expression of God's moral intention. Finger's paper identified well the different understandings of law within the Reformation theologies, showing contrast between the Lutheran and Reformed understandings and noting ambivalence within the Anabaptist tradition. Conrad Brunk developed a philosophical understanding of the nature of law. He argued that understandings of the nature of law fall either into natural law or legal positivist categories. While the former provides law with a moral ontology, the latter perceives law as humanly contrived.

Brunk's assessment was that Mennonites generally fall into the latter category and therefore take too negative a view toward law. He argued that both Lind and Toews, because they understand God to be the authority behind and above law, cannot be identified as legal positivists. They fall therefore into the natural law category, representing the "divine command" proponents within the larger natural law

category. Since both Lind and Toews opposed natural law understandings, a lively discussion ensued, which the conference never fully resolved.

The conference did not have a findings committee since its purpose was not to draw conclusions or make recommendations. Its purpose was to open and begin discussion on this topic of vital significance to the Mennonite peoplehood. Hence these papers will fulfill their contribution as they stimulate further discussion on this issue. Both the theses of Millard Lind and John Toews turned new furrows in the field of biblical theology. These five articles together will lead us all to think in some new directions and help us clarify the Mennonite attitude toward law.

The Institute of Mennonite Studies welcomes your responses to these contributions together with your insights on "the Bible and Law." The Institute plans to continue to address this issue in its various programs of consultation, research and publication.

In the preparation of these papers for publication during my absence on sabbatical, I was fortunate to have the assistance of Leland Harder, the Associate Director of IMS, who designed the format and negotiated the printing; Rachel Stoltzfus, IMS Administrative Assistant, who helped with the many details of the Seminar, retrieved the papers following their revision, and saw to the typing of the final manuscript; Daryl Wallace, who helped with the proof-reading; and Sue Yoder, who did part of the typing.

Editor Willard M. Swartley

LAW IN THE OLD TESTAMENT

Millard C. Lind

We are witnessing today a revival of the church's interest in justice and law. This is evident by the activity of organizations such as MCC Prison Ministries, VORP, the Christian Legal Society, and by the many articles appearing in legal magazines on the subject of the Christian and law. At the same time there has been a renewed interest in the Bible and law as evidenced by the many books and articles which have recently been published on this subject. The discovery of the code of Hammurabi¹ in 1901 by the French expedition at Susa (18-17th c. B.C.), the later discoveries of the Ur-Nammu code (21st c. B.C.), the Lipit-Ishtar code (19th c. B.C.), the Eshnunna code (18th c. B.C.), the Middle Assyrian laws (12th c. B.C.), the Hittite laws (date?), the Neo-Babylonian laws (7th c. B.C.), as well as many royal edicts, documents and letters referring to ancient business and legal transactions, have stimulated interest in the study of law in the Old Testament. This study of law in the Bible, however, is seldom drawn upon as a resource by those interested in the practical question of Christianity and law. Many articles and books on Christianity and law promote a return to a revised classical medieval position, often including a revival of the doctrine of natural law, with a minimal reference to what has developed in biblical studies.²

It is the purpose of this paper to call attention to the new experience in justice and law as discovered by recent studies in the Bible and to challenge the church to build its approach to modern problems of law and order upon the biblical foundation of this new experience.

The Bible is so saturated by the concept of law that it is scarcely possible to understand its narratives, prophetic oracles, prayers, songs, proverbs, even its understanding of God and his relation to Israel without understanding something of its legal concepts.³ This legal orientation is further emphasized by the fact that the⁴ Pentateuch contains no fewer than three law⁵ codes: the Covenant code (Ex. 20:22-23:33),⁵ the Deuteronomic code (Deut. 12-26;28) and the Holiness code (Lev. 17-26), besides the laws usually designated as P, and a number of smaller collections such as the Decalogue (Ex. 20:1-17; Deut. 5:6-22), the Cultic Decalogue (Ex. 34:10-26), and the Dodecalogue (Deut. 27:11-26).

To simplify my task, I will base this paper mainly upon the text of what is generally regarded as the oldest biblical code, the Covenant code, especially Exodus 20:22-23:19.⁶ I will take account of critical studies in this paper. The tentative and fragmenting tendency of such studies may be overcome to a considerable extent by canon criticism, the insistence that critical studies must⁷ contribute to an understanding of the present text. I will gather up my remarks on the Covenant code under four statements: (1) The Covenant code deals with "secular matters" comparable to the concerns of Near Eastern codes, the kind of societal problems which arise in the daily life of an ancient community. (2) In the structure of the code the laws begin and end with "religious law," and the code is interspersed with that law, laws which have to do with the relationship between God and Israel. (3) The law is given in the form of *parenesis*, teaching-preaching, the radical motive and model for law being God's liberation of Israel from Egypt. (4) The purpose of the Covenant code in terms of the ancient Near East is radical and revolutionary. Following a discussion of these four points, I will comment on what I think this may mean for the church today.

I. REMARKS ON THE COVENANT CODE

1. *The Covenant code deals with "secular matters" comparable to those of the Near Eastern codes, the kind of societal relationships and problems which arose in the daily life of an ancient community.*

This point is illustrated by the following laws from the Covenant code and their parallels in the Near Eastern codes:

LAW OF THE GORING OX:

Exodus 21:28f., 35, 36(RSV): When an ox gores a man or woman to death, the ox shall be stoned, and its flesh shall not be eaten; but the owner of the ox shall be clear. But if the ox has been accustomed to gore in the past, and its owner has been warned but has not kept it in, and it kills a man or a woman, the ox shall be stoned, and its owner also shall be put to death. If a ransom is laid on him, then he shall give for the redemption of his life whatever is laid upon him. If it gores a man's son or daughter, he shall be dealt with according to this same rule. If the ox gores a slave, male or female, the owner shall give to their master thirty shekels of silver, and the ox shall be stoned.

Eshnunna code: If an ox gores a [nother] ox and causes its death, both ox owners shall divide [between them] the price of the dead ox.

If an ox is known to gore habitually and the ward authorities have had [the fact] made known to its owner, but he does not have his ox dehorned [?], it gores a man and causes [his] death, then the owner of the ox shall pay $\frac{2}{3}$ of a mina of silver.

If it gores a slave and causes [his] death, he shall pay 15 shekels of silver.

LEX TALION:

*Exodus 21:23-25 (RSV):*¹⁰ If any harm follows [a miscarriage], then you shall give life for life, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe.

*Hammurabi code, 196ff.:*¹¹ If a seignior has destroyed the eye of a member of the aristocracy, they shall destroy his eye. If he has broken a[nother] seignior's bone, they shall break his bone. If he has destroyed the eye of a commoner, or broken the bone of a commoner, he shall pay one mina of silver. If he has destroyed the eye of a seignior's slave, he shall pay one-half his value. If a seignior has knocked out a tooth of a seignior of his own rank, they shall knock out his tooth. If he has knocked out a commoner's tooth, he shall pay one-third mina of silver.

RAPE OF AN UNMARRIED GIRL:

*Exodus 22:16-17 (RSV):*¹² If a man seduces a virgin who is not betrothed, and lies with her, he shall give the marriage present for her, and make her his wife. If her father utterly refuses to give her to him, he shall pay money equivalent to the marriage present for virgins.

*Middle Assyrian laws:*¹³ ...if a seignior took the virgin by force and ravished her, either in the midst of the city or in the open country or at night in the street or in a granary or at a city festival, the father of the virgin shall take the wife of the virgin's ravisher and give her to be ravished; he shall not return her to her husband [but] take her; the father may give his daughter who was ravished to her ravisher in marriage. If he has no wife, the ravisher shall give the [extra] third in silver to her father as the value

of a virgin [and] her ravisher shall marry her,... If the father does not [so] wish, he may receive the [extra] third for the virgin in silver [and] give his daughter to whom he wishes.

The form of the laws illustrated above is casuistic or conditional law, a type of case law which probably originated in the local courts at the city gate.¹⁴ Presumably the legislative agency (in NE law the king; in biblical law, Yahweh as represented by specialists assembled before God) gathered up these local laws to present them as examples of how court cases should be judged. Other forms from everyday life were used also which we have not illustrated, such as proverbs and ethical statements, which some jurists would not describe as law (22:28; 23:7).

We conclude this point with the generalization that biblical law deals with the practical matters of an ancient society: rape, retribution, problems with animals, slavery (Ex. 21:2-11), business relations, etc. In this respect biblical law is secular; it deals with matters of everyday life, matters which are ordinarily taken up by secular courts.

2. In the structure of the Covenant code the laws begin and end with "religious law," and the code is interspersed with that law, laws which have to do with relations between God and Israel.

The laws in the Covenant code begin with a law which prohibits making an image of God, and a law in regard to the altar (Ex. 20:23-26). They end with the laws of the religious feasts and sacrifice (23:14-19). That this was done deliberately is suggested by the fact that the Holiness code (Lev. 17:3-7; 25:55-26:2), the Deuteronomic code (Deut. 12:2-7; 26:12-15), and the Dodecalogue (Deut. 27:15, 26)¹⁵ similarly begin and end with religious laws. Religious law is also interspersed with secular law. In this respect biblical law is not at all secular. People relationships are subjected to the immediate authority of the relationship between God and Israel.

The first commandment of the Covenant code prohibits the making of images of Yahweh (21:23). No comparable law is found in extra-biblical NE juridical texts. The law probably does not refer to the spirituality of God, but is directed rather against the manipulation of divinity.¹⁶ The idol was a primary means by which ancient people manipulated their gods.

Underlying this law is a Hebrew concept of the freedom of God which makes it impossible to manipulate him. God is not identifiable¹⁷ with the life process, though he is creator of it. He is therefore in charge, not prisoner, of fate and is able to move creation toward those goals which are consistent with his loving will and character. He takes humankind into partnership in this task by placing them under his command. Though he may be petitioned, he may not be manipulated to perform in accordance with the lesser goals of the human community. In Israelite law, God is sovereign.

The law of the altar (20:24-26) is not to be understood merely as a primitive characteristic of Israelite religion.¹⁸ The probable intent of the law of the earthen altar is suggested by the use of the word "sword" (*hereb*) in verse 25. Early Israel was aware of the close relationship between cultural progress and the attempt of people¹⁹ involved in that progress to dominate their fellows. The altar of Yahweh was not to be polluted by the instruments (such as the sword) closely associated with the domination of brother/sister. If this interpretation of the altar law is correct, it is a fitting introduction to this body of law which has to do with justice in Israel.

The prohibition of the stepped altar is related to the practice of sexual relationships in worship, a widespread practice in the ancient NE world. The ritual of sexual relations was used as a magical means whereby the worshipper might gain the fertility of the gods for family, herd, and crop. This central concept of worship was replaced in Israel by the more rational experience of the worshipper confronted by

the word of God, especially his word of command. These introductory laws are polemical in their intent, set against the practices of the Canaanites among whom Israel lived. The polemic was not a superficial one, but pointed to the heart of the differences between the Canaanite and Israelite experience of divinity and their resultant ways of life.

In contrast to Hebrew law, the laws of the NE law codes are entirely secular, that is, they deal only with people relationships. All of the NE codes are kingship law. This does not mean that the gods had nothing to do with law. In Mesopotamia the sun God, Shamash was the god of justice.²⁰ Though the gods authorized the law (a few scholars have held that they even gave the law), the king was the central figure who as servant of the gods dominated the legislative process. Hammurabi is designated in the prologue of his code as "the king of justice." The coercive elements of his office provided the setting for effecting the law:²¹

The king who made the four quarters of the world subservient; the favorite of Inanna am I.

When Marduk commissioned me to guide the people aright, to direct the land
I established law and justice in the language of the land....

The pronoun referring to the king dominates the prologue and epilogue of his code, just as it dominates the NE war literature.²² In biblical law, as well as war literature, the first person singular pronoun of Yahweh is dominant.²³ From the Israelite point of view, this contrast was the essential difference between the word of man and the word of God.

This characteristic of the biblical law codes makes pertinent the question of the relationship of the later office of Israelite kingship to biblical law. It is obvious from the Old Testament that Israelite kingship had something to do with Israelite law and justice.²⁴ The most decisive and characteristic

fact of Israelite law and justice, however, is that although Israel adopted (and adapted) kingship, the Israelite law codes were never reoriented to the office of kingship.²⁵ In this fundamental respect, kingship in Israel never became like kingship of the NE.

The administration of law in Israel was primarily the task of local courts and the clan.²⁶ While local justice was aided by a common cult which helped to develop and promulgate a law code comparable in some respects to the codes of other NE states, Israel's common cult was not coercive as were the centralized legislative offices (kingship) of other states. The standardization of Israel's inter-tribal justice was dependent upon the devotion of every clan and family to Yahweh, whose will was made known in Covenant law, as developed and proclaimed at the common worship center (See Deut. 31:9-13; Josh. 24) and elsewhere.

3. *The law is given in the form of teaching/preaching (parenesis), direct address which exhorts Israel to obey law for various reasons. The most radical and fundamental of these reasons is Yahweh's liberation of Israel from Egypt.*

The law is introduced by the statement that God commanded Moses to speak the words of the law to Israel. What follows then is given in prophetic speech; "You have seen that from heaven I spoke with you."²⁷ This speech of Yahweh is characteristic of the Covenant code throughout, though casuistic laws are set within this structure (see 21:1-22:18) and other laws refer to Yahweh in the third person (21:19). *Paranesis* is not found in the extra-biblical NE law codes.

Moses in this law code proclaims law as the word of Yahweh not to a local meeting, to a clan, or a tribe, but to all Israel. It is an inter-tribal occasion. If this Covenant code is pre-kingship, this is evidence of some kind of pre-kingship structure to make such an occasion possible.²⁸

The characteristic form of Israelite law in the Covenant code is a type of apodictic law which addresses Israel in the second person: "you shall..."; "you shall not" (See 20:23,24). This type of law (in the second person) is not found in other NE law codes. Elsewhere in the Bible this type of command is used by persons²⁹ in authority such as kings or political leaders. It was therefore well adapted to express the unconditional demand of Yahweh in direct address to his people. Shalom M. Paul says that this unique type of law in the Bible "is explicable only in terms of Israel's total covenant structure. God's expressed demands in covenant law were declared publicly to the total community. By making his will directly and personally known to man, an I-thou relationship is established which characterizes the unique feature of this newly founded nation. Moral and religious prescriptions are directed to each and every³⁰ member of this nation in categorical imperatives."

A related characteristic of Israelite law is the motive clause, a dependent clause attached to the law which gives a reason or purpose for the law. Although there are motive clauses in the NE law codes, the codes include none which refer to history, to the divine will or promise. Rifat Sonsino says of the motive clause,

It is noteworthy that, unlike biblical laws, no cuneiform law is ever motivated by reference to an historic event, a promise of well-being or, for that matter, a divine will. In fact, in these laws the deity is completely silent, yielding its place to a human lawgiver whose main concern is economic rather than religious. Biblical law on the other hand, ascribed in its totality to God both in terms of source and authorship displays a concern that goes beyond the economic enveloping all aspects of community life, whether

past, present and future, and incorporating both the strictly cultic/sacral and that which remains outside of it."³¹

An example of a motive clause is found in Exodus 22:21 (RSV): "You shall not wrong a stranger or oppress him, for you were strangers in the land of Egypt." About 16 percent or 17 percent of the laws in the Covenant code are joined with a motive clause. Laws with motive clauses in the Deuteronomic and Holiness codes run as high as 50 to 65 percent.³² The character of the motive clauses is summed up by B. Gemser,

...the motive clause constitutes an instructive compendium of the religion, theology, ethics, and democratic, humanitarian outlook of the people of Israel, as represented in the Old Testament laws.³³

The purpose of the motive clause is obviously to make law inward, to write law upon the heart (See Deut. 6:6; Jer. 31:33).

Some of the most unique of motive clauses are those which allude to redemptive history, especially to liberation from Egypt. These are scattered throughout the various law collections (See Ex. 22:20; 23:9,15). It is obvious that the motive attached to the law of the resident alien not only provides motivation for being kind to the alien, but provides the model for the behavior itself. This is especially evident when one realizes that NE law does not give special consideration to the alien (though it does to the widow and orphan).

Yahweh's liberation as a model for social law may also be reflected by the fact that the first societal law in the Covenant code is a law protecting the slave, an unusual fact in contrast to all other codes, except for the Decalogue "which also begins with slavery."³⁴

This use of Yahweh's liberative act in effect transforms law. This is suggested by the structure of the book of the Covenant. Exodus 21:1-22:18 is

made up entirely of casuistic law, case law, presumably originating at the court, the city gate, not greatly affected by covenant, and inserted as a block into this code. By this act the early Israelite jurists were evidently motivated by the conviction that "secular law" must be brought under the power of the covenant God as worshipped by the covenant community.³⁵ What happens to this body of law over the centuries is illustrated by the parallel law of slavery found in Deuteronomy 15:

Exodus 21:2-11

When you buy a Hebrew slave, he shall serve six years, and in the seventh he shall go out free, for nothing. If he comes in single, he shall go out single; if he comes in married, then his wife shall go out with him. If his master gives him a wife and she bears him sons or daughters, the wife and her children shall be her master's and he shall go out alone. But if the slave plainly says, "I love my master, my wife, and my children; I will not go out free," then his master shall bring him to God, and he shall bring him to the door of the doorpost and his master shall bore his ear through with an awl; and he shall

Deuteronomy 15:12-18

If *your brother*, a Hebrew man, or a *Hebrew woman*, is sold to you, he shall serve you six years, and in the seventh year you shall let him go free from you. And when you let him go free from you, *you shall not let him go empty-handed; you shall furnish him liberally out of your flock, out of your threshing floor, and out of your wine press; as the Lord your God has blessed you, you shall give to him. You shall remember that you were a slave in the land of Egypt, and the Lord your God redeemed you; therefore I command you this today.* But if he says to you, "I will not go out from you," because he loves you and your household, *since he fares well with you*, then you shall take an awl, and thrust it through his ear into the door, and he shall be your bondman for ever.

serve him for life.
When a man sells his
daughter as a slave,
she shall not go out
as the male slaves
do....

*And to your bondwoman you
shall do likewise. It
shall not seem hard to
you, when you let him go
free from you; for at half
the cost of a hired ser-
vant he has served you
six years. So the Lord
God will bless you in all
that you do.*

I am not arguing here that the Deuteronomic law is a development of the law as found in Exodus, but I do argue that they are parallel enough to suggest a relationship. It is evident that the younger law is profoundly liberalized. Now the male and female slaves are to be treated alike; concubinage is prohibited in Deuteronomy. Now, after their service they are to be released with property for it is recognized that there is no freedom without property. The motive and model clause is added: "And you shall remember that you were a slave in the land of Egypt, and Yahweh your God redeemed you; therefore I am commanding you this thing today" (v. 16). Deuteronomic law makes slavery entirely voluntary when it forbids that a runaway slave be returned to his master (23: 15-16). This did not do away with slavery any more than a modern person's right to own his/her own business has done away with hired labor. It did, however, give the slave a choice in the hard economic realities of existence, and forced the slave master to be careful how he treated his slave.

Commenting on Deuteronomy 15:15, Hans Boecker writes:

Israel's existence as a people freed from slavery demanded a different view of slavery from that current elsewhere. It is particularly clear in the Deuteronomic slave law how law in the Old Testament was interpreted and understood in an increasingly theological way. The aware-

ness that emerged in slave law also impinged on many other areas of life. An essential feature of Deuteronomy is the theologization of older legal prescriptions.³⁶

This influence of the motive clause is further augmented by the fact that law is placed in Israel within the context of the story of God's activity for his people. Law in Israel is not universalized but particularized. As Shalom Paul suggests in its present context the purpose of the Covenant code is stated in the preamble, Exodus 19:3-6. After stating Yahweh's act of liberation, the purpose of the forthcoming covenant is set forth: by observing the covenant laws Israel would become Yahweh's "treasured possession," a kingdom of priests, a nation³⁷ dedicated to the service of Yahweh among the nations. Israel would lead the nations with a new kind of law.

This particularization and purpose of law suggests the utter fallacy of the attempt of the church to find common ground with the state by a concept of "natural law." "Natural law" is a pagan doctrine of the Stoics, but found also among the Babylonians in the concept of *kittum*, "truth," or the nature of things.³⁸ Biblical law is revolutionary, ever driving forward with dangerous risks for the redemption of the individual and society, using as the pattern for public life the risk-taking of Yahweh himself on behalf of his people. Such a concept has nothing in common with that of natural law, a pagan doctrine founded upon the fallen structures of present reality.

4. *The purpose of the Covenant code in terms of the ancient Near East is radical and revolutionary.*

What we have said of biblical law contradicts the the concept still shared by many that the characteristic of biblical law is the *lex talion* (law of retaliation). We have seen that the *lex talion* is found also in the Hammurabi code. It was designed by ancient society as a control of the vendetta (See Gen. 4), to maintain equilibrium of power between two social clans or groups. Most ancient NE law

codes softened the *lex talion* by providing for the³⁸ substitution of compensation to the injured party. In the biblical codes it appears three times (Ex. 21:22-25; Lev. 24:18,2; Deut. 19:21). In the first instance the law is qualified immediately afterward by compensating the destroyed eye or tooth of a slave with the slave's freedom (Ex. 21:26,27). In the second instance, if the guilty party killed an animal, he was to make restitution (Lev. 24:21) by giving the victim a comparable animal. Restitution was not to be made, however, in a case of murder. For that, the guilty party was to be put to death. The same law was to apply to citizen as well as to resident foreigner (Lev. 24:22). The third instance deals with a malicious witness who in court accuses another of a crime. When the truth is discovered, the court is to do to the false witness what the witness intended to do to his brother: "Show no pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot."

In the extra-legal literature of the Bible, capital punishment was sometimes mitigated. For example, the writer of the story of the first murder did not feel it necessary that Yahweh apply the death penalty to Cain. Instead, Yahweh protected Cain from the death penalty (Gen. 4:16). In the case of David's murder of Uriah, Nathan did not feel it necessary to apply the death penalty to David, though the crime was taken very seriously. In response to the crime of adultery (not connected with *lex talion*, but for which the law codes designated capital punishment [Lev. 20:10]), Hosea redeemed his wife instead because of an express command of Yahweh, who included in the command a motive clause giving a reason;³⁹ "And Yahweh said to him, 'Go again, love your wife, loved by another an adultress, just as Yahweh loves Israel, though they turn to other gods and lovers of raisin cakes'(NIV). Here the motive clause becomes a model clause. Instead of capital punishment for his wife as the law demands, Hosea is to follow the model clause, the example of Yahweh's love for Israel by redeeming her.

Perhaps this concept of righteousness and justice is the reason why the Gospel of Matthew says of Joseph, "...and her husband Joseph, being a just man and unwilling to put her to shame, resolved to divorce her quietly" (Matt. 1:19, RSV). Jesus is found in this same legal tradition when asked to judge the woman caught in the act of adultery (somehow her lover had not been caught in the act of adultery!). The Pharisees reminded Jesus, "In the Law Moses commanded us to stone such a woman. Now what do you say?" Jesus' answer was not one of acquittal, for the woman was guilty. His answer compares to that of the prophets: the Jews were all guilty of apostasy, but obviously God, though he had punished Israel, had not executed the death sentence. Could those who were guilty of a capital offense (apostasy) execute another who was guilty of a capital offense? Jesus, like Hosea, followed the example of Yahweh, in this case by pronouncing forgiveness: "Neither do I condemn you. Go now and leave your life of sin" (John 8:3-11, NIV).

My point in giving these examples is to show that such acts as these of Jesus and Hosea are not contrary to the law of the law codes as those who think that the mood of the codes is *lex talion* have assumed. These examples are rather a fulfillment of the law codes, codes whose characteristic mood is that of the motive clause, especially that motive clause which points to the action of Yahweh's redemption: "I am Yahweh your God who brought you out from the land of Egypt, from the house of bondage" (Ex. 20:1). The characteristic purpose of Israelite law is to redeem, not to punish. That tension within law which exists between the *lex talion* (NE law) and the motive clause is well expressed by the Law Preacher on the Mount:

You have heard that it was said, "An eye for an eye and a tooth for a tooth." But I say to you, Do not resist an evil person. If someone strikes you on the right cheek, turn to him the other also. And if someone wants to sue you and take your tunic, let him have your cloak as well. If some-

one forces you to go one mile, go with him two miles" (Mt. 5:38-41, NIV).

Further more, the purpose of law was to redeem more than the individual. Its purpose was social redemption, to redeem the entire society. This purpose is suggested in the eschatological oracle, Micah 4:1-4.⁴⁰ The law underlying this oracle has to do with both international relations and relationships within each nation. In international relations the world's peoples choose law instead of the sword (or balance of power) to settle disputes (4:3). The law is Yahweh's torah, based not upon force but upon the people's voluntary acceptance. It is a teaching which they choose to learn (4:1). This international law was not a figment of the prophet's imagination. It undoubtedly came from case law, the precedents coming out of inter-tribal relationships during the period of the Judges when the tribes went up to the common worship center to adjudicate their differences. What had been inter-tribal would one day be international. The law of Yahweh will give order to international disorder.

This law of Yahweh will give order also to internal economic relations, relationships within each nation:

Every householder will sit under his own vine
and under his own fig tree,
and none shall make him afraid (4:4).

This is the climax of the prophet's vision: a peaceful world order ruled by the law of Yahweh, a law which inverts the social pyramid of the kingship states of the NE. And now the prophet says that what the law of Yahweh will achieve for the world in the future is what the law of Yahweh is about for Israel in the present:

For all the peoples walk
every one in the name of his god.
But *we* walk
in the name of our God, forever (4:5).

Israel was to accept the torah of Yahweh, instead of the sword, for international relations. For internal relations, the torah called for the economic freedom of each household instead of the Canaanite feudalistic structure of the city state. Yahweh has liberated Israel from the slavery of Egypt; each household was to remain free by obedience to Yahweh's law. This freedom is reflected in Israel's law codes by the fact that these codes recognize no social classes among the Hebrews.

The concern for economic and social equality is further reflected in Israel's special care for people rather than property, for those who did not benefit from her economic system. We have noted how concern for the alien was linked to the experience in Egypt by the Covenant code (22:21). Another law protects the widow and orphan, who if mistreated would cry out for Yahweh's justice just as Israel had cried out for justice in Egypt (22:22,23). Likewise, money was to be loaned to the poor without interest. If a cloak was taken in pledge it was to be returned before evening, again that the needy man might not cry out for justice: "What else will he sleep in? When he cries out to me, I will hear, for I am compassionate" (22:27), (an interesting motive clause to include in a law code!).

The Holiness code provides for a sabbatical year, every seventh year, when the land was to lie fallow, its natural produce reserved for slaves and hired servants, the alien, live stock and wild animals (25:1-7; cf. Ex. 21:2). The law of Jubilee, every seventh sabbatical year, provided that the land revert to its original household, from which it was never to be permanently alienated (25:8-32). Help for the poor is explicitly linked to Yahweh's redemption of Israel from Egypt:

If one of your countrymen becomes poor and is unable to support himself among you, help him as you would an alien or a temporary resident, so that he can continue to live among you. You must not lend him

money at interest or sell him food for profit. I am the Lord your God, who brought you out of Egypt to give you the land of Canaan and to be your God (Lev. 25:35-38).

Likewise Israelites are not to be sold as slaves: "Because the Israelites are my slaves, whom I brought out of Egypt, they must not be sold as slaves. Do not rule over them ruthlessly, but fear your God" (Lev. 25:42, 43; cf. vs. 55).

The Deuteronomic code is the most humanitarian of all the codes. It uses the word "brother" approximately forty times, usually of someone who is in need of help. The brother is a poor man for whom one must cancel a loan or other debt on the seventh year (15:1ff.). One is not to be tightfisted toward the brother; rather he is to be loaned whatever he needs (15:7). There will always be the poor; therefore one must always be open-handed toward the brother. Even the king is not to think of himself as better than his brothers and turn away from the law to the right or left (17:15). One does not give false testimony against his brother (19:18-19). The prophet is not to be taken from a superior social class, but is to be one from among his brothers (18:18). One must care for and return one's brother's animals if they stray or are in trouble (22:1ff.). The Edomite is not to be abhorred, because he also is a brother; nor is the Egyptian, for the Israelites lived as aliens in his country (23:7). One does not charge interest of the needy brother (23:19,20), nor take advantage of a hired man who is poor whether he is a brother Israelite or a foreigner (24:14; cf. v. 17). The brother is not to be degraded by excessive flogging (25:3).

The motive clause of liberation from Egypt is sometimes linked with the command to help the disadvantaged (15:5; 24:16,18; 26:5-11). Many of these laws of mutual aid are concerned not just to help the disadvantaged momentarily, but to keep them from becoming indigent or to restore them to a level where they can help themselves.

II. WHAT DOES THIS MEAN?

I will now present a short summary of what I have said and comment on what this may mean for the present.

1. *Two Types of Law.*

There were two types of law in the ancient Near East, the Hammurabi type and the biblical type of law. The Hammurabi type had its beginnings in ancient Sumer and had spread throughout the ancient NE. It was kingship or "state" law. The laws were purely secular, impersonal, emphasizing property rights and a pyramid type of societal structure. Law was rooted in *kittum*, "truth," the structure of nature and society as these structures were understood by ancient man.

A new type of law appeared in the Near East in approximately the thirteenth century B.C. It included the characteristic NE casuistic type, which presumably developed in the legal court and dealt with strictly secular subjects. However, it enveloped this secular law within Covenant law or commandments dealing with the authority of Yahweh only and with his worship. This law was uniquely characterized by *parenesis*, in which the will of God was spoken directly to the people. It is uniquely characterized by the second person singular, apodictic form, "you shall not," "you shall," a form which may have been used by persons of authority such as clan fathers and kings, and was thus especially appropriate to express the authority of Yahweh. Finally, this new type of law is characterized by the motive clause, uniquely so by those clauses referring to an historic event, a promise of well-being, or to a divine will, in this way respecting human intelligence and freedom, attempting to make law compatible with the human will. This motive clause also served as model clause, the ultimate model being Yahweh's liberation of Israel from Egypt, a revolutionary model as compared to *kittum* or "natural law." The liberation model qualified slavery, poverty, and even the rights of the

resident foreigner, and had as its ultimate goal a world-wide egalitarian society ruled by this law, with each household free from poverty and oppression.

2. *Where are these Two Types of Law Found Today?*

It is not difficult to identify the law of today which is in continuity with the Hammurabi type of law. The essential secularity, human origin, and power orientation of extra-biblical NE law, Roman, Continental, and English law is general knowledge. If we delete the prologue and epilogue of Hammurabi's code, as the Hebrew prophets were inclined to do, we are left with purely secular laws which express no relationship to the divine. This leaves the modern state, with only the human power principle to enforce law; hence the revival of various forms of *kittum*, the doctrine that positive law has its foundation in natural law.⁴¹

However, it is an over-simplification to say that the Bible simply rejects the prologue and epilogue of Hammurabi's code. It only rejects Shamash, Anu and Enlil as divinities, recognizing them, however, as impersonal powers. The Bible criticizes both these impersonal powers and human princes as in rebellion against Yahweh. From Yahweh's perspective they do not rule with justice in their various states (Ps. 82).⁴² Likewise there is both prologue and epilogue (written or unwritten) to modern state law. Both prologue/epilogue and the laws that derive from it are regarded from a biblical perspective as rebellion against Yahweh.

It may be more difficult to discover continuity with biblical law. In the New Testament the continuity is clear. The law sermons of Jesus, both in Matthew and Luke, are in direct continuity, fulfilling the Old Testament law codes. The New Testament use of "Stoic law" in various collections of household law (See Col. 3:18-4:1), where Stoic law is "borrowed" and corrected by bringing it into tension with the gospel, is in obvious continuity with the way the Old Testament law codes use casuistic law.⁴³

There is "secular" law in the New Testament, placed within the covenant structure of God and his people. It includes the motive/model clause of God's act in Christ, a radical revolutionary law when read by Roman standards, a law which placed Greek and Barbarian, male and female, in a common brother-sisterhood relationship.

Where is the setting for biblical law today? Obviously, its continuity may be found only within the structure of covenant community, whether that of the Synagogue, the Church, or the Mosque. The Synagogue and the Mosque are clear; they acknowledge that they are guardians of law, that the faith community is a legal community. It is beyond the purpose of this paper to critique their particular understanding and practice of law.

What about the Church? Augustine set the pace for medieval legal theory by personalizing the Stoic doctrine of *lex aeterna* (eternal law), insisting that "the divine wisdom is the universal law." However, for him this personalized *lex aeterna* is administered through the impersonal powers of the state: "God legislates to the whole of mankind through the mouths of emperors and kings."⁴⁴

As we have shown above, one cannot transform the Hammurabi type of law (kingship law) into biblical law merely by changing the prologue. The impersonal power element in kingship law is the heart of the problem. The personal God revealed in the liberation from the impersonal powers (represented by Egypt), and in the liberation in Christ from the impersonal powers of this world, and who gives at Sinai and the Mount his personal law, does not now regress legislatively to be represented "to the whole of mankind through the mouths of emperors and kings." The church has not done as well as ancient Israel; for Israel never reoriented her law codes to kingship.

Augustine's paganization of the church's law is at the heart of the church's problem of holding together law and grace, social action and the gospel. When the church deliberately reorients her law from the grace

principle to the power principle, she ought not complain if grace and law, worship and life, social action and the gospel seem to "fall apart." They did not just "fall apart"; rather the church separated them by a deliberate act, just as the Sumerian-Hammurabi legislators made a clean separation of their worship and legal corpus a thousand years before Moses.

It is not my task to trace the church's paganizing of law through Thomas Aquinas and the sixteenth century reformers (it seems to become progressively worse). If congregations wish to be in continuity with biblical law, they must accept law where God has placed it, within the covenant structure of God and people. They must experience the revolutionary effect of the gospel upon those rules and regulations arising out of the social and physical structures of this world.

3. *The Congregational Court.*

One of the most obvious meanings for us in regard to biblical law is that Christians should settle their own differences instead of taking them to the secular courts. This is an injunction from the New Testament itself. In his first letter to Corinth, Paul said, "When one of you has a grievance against a brother, does he dare to go to law before the unrighteous (*ādikos*) instead of before the saints" (1 Cor. 6:1)? The Jerusalem Bible translates, "How dare one of your members take up a complaint against another in courts of the unjust...?" The unjust here refers to the courts of the pagan society whose justice was based on Greek-Roman law, courts which rejected the motive clause of the gospel as the model for justice. Paul makes the point that it is only the saints, whose wisdom is founded upon God's act in Christ, who are capable of making a just decision.

Just decisions do not come without effort even in a Christian community. Paul says, "Can it be that there is not a single wise man among you able to give a just decision in a brother-Christian's cause?" (1 Cor. 6:5, NEB). If God's people are to judge the

world and even angels, as Paul says (1 Cor. 6:2,3), it is time that we give attention to biblical principles of justice so that we can make just judgments in the mundane matters of this life (1 Cor. 6:3). We dare not leave matters of justice to the unjust courts, courts which do not accept the gospel as the norm and foundation for justice.

4. *Strategies for Relating Biblical Law to State Law.*

We have seen that we cannot be faithful if we accept state law as our rule for communal life. Nor can we be faithful if we adopt a policy of physical withdrawal from this world (our own historical temptation), for Yahweh's law and justice are aggressive. This aggressive character of biblical law is set forth by the servant poems of Isaiah 40-55. While much has been made of the suffering servant, we should know that this passage speaks of two of God's agents. Cyrus as Yahweh's "anointed one" was chosen as Yahweh's "bird of prey from the east" (46:11). His task was to return Israel to her land. But Cyrus never became, as did Hammurabi in relation to Marduk, Yahweh's "king of justice" to establish Yahweh's justice in the earth. This was to be the work of Yahweh's second agent, his servant Israel (or representative of Israel). He "will bring forth justice to the nations" (42:1), he will establish "justice in the earth," the law of Yahweh in the far-off nations (42:4) and he will do this nonviolently (42:2-3; 49:2; 50:4-11).

It is God's strategy that his law is to rule the world; that is what Jesus and the church are about.

If we cannot make state law our law nor physically withdraw from this world, how do we relate to state law?

First, there is the strategy of participation in the economic and political structures of this world. The question for the Christian in economics is not whether a Christian may be rich, but how can a

Christian participate so as to promote brother/sisterhood economics. The question is not whether the Christian can participate in the political process, but where and how to participate in that process so that people can experience something of the transforming power of the gospel. When we participate in the structures of this world we do not leave covenant structure behind; we take it with us. Also, when we enter the congregational meeting we should not leave those rules and laws by which we live and do business outside; we should bring them inside for our own scrutiny before God and for the scrutiny of our brothers and sisters. Christian associations such as the Mennonite Medical Association, MEBA, or the Mennonite lawyers organization should help in this process.

Both Moses and Jesus rejected the state for an alternative vision, and their rejection of the state is central to biblical faith. Joseph and Daniel, however, held high state office, though they rejected the wisdom by which the state is operated. Their course should not be followed without a commitment to martyrdom. The nature of the problem is pointed up by the courageous words and action of William Bontrager, judge of Elkhart Superior Court II. Commenting on Judge Bontrager's statement of a head-on collision between the law of God and the law of man, *The Goshen News* in an editorial felt that Bontrager was making the right decision by bowing out as superior court judge: "Judges must set a perfect example in following man's law, which a majority of state legislators must feel isn't contrary to God's law."⁴⁵ This "law of man" is a legal system which assumes its own authority, backed ultimately by physical coercion.

This "head-on collision" between the two types of law is what the book of Daniel is about. In the sixth chapter the issue is which law is sovereign: the law of Daniel's God (6:5) or the law of the Medes and the Persians (6:8,15). Daniel rested his case with the sovereignty of the law of God and continued

to worship God rather than the king, just as he had been accustomed to do. It is significant that the writer saw the clash between the sovereignty of the two laws as centering in worship, the choice being not between the worship of two gods, but between *God* and the *king* (6:7). The story then focuses on who can save Daniel from the law of the Medes and Persians. The king was on the side of Daniel but, like Judge Bontrager, found himself stuck with the sovereignty of his own law. He called his lawyers and "labored till the sun went down," but was unable to find a loophole in the law. Finally, he makes his acknowledgement: the king himself is helpless and unable to save from the sovereignty of his own law. The system works! His question then is whether Daniel's God can save, a question which we must now ask in regard to the Palmer case. The answer of the book of Daniel is that God can save from capital punishment those who obey his law. God and his law are sovereign, a point which Darius at the end of the chapter acknowledges.

We know, however, that the God of Daniel does not always save from capital punishment, the most notorious case being Jesus of Nazareth (the system works). Jesus rested his case in the sovereignty of God by drinking the cup. As a result of the events which followed, the apostles proclaimed that this act was God's victory over the powers! ⁴⁶

A second way the church might relate to state law is through alternate structures. This is illustrated in the arena of justice by MCC prison ministries and Mennonite cooperation with VORP. These structures must themselves be subject to covenant structure, if they are not to become coercive and ethnic.

In all its endeavors to relate to state law, the church needs to "talk it up." The church is a community which remembers. *Living More With Less* is an exchange of ideas and experiences which moves the church in the right direction. *Dial 911*, the story of how Reba Place Fellowship dealt with crime, is

the material out of which precedent is established. These only touch the surface of the experiences which ought to be made available to our congregations.

5. *Creation and Redemption.*

To understand the relationship of church and world we need to understand the relationship between creation and redemption. The biblical doctrine of creation was not arrived at by acceptance of the physical and social structures of this world and by fitting the gospel within them. That only results in the paganization and surrender of the gospel. Instead, the key to that which was in the beginning is found in that which is presently becoming, the gospel itself, the prism through which all worldly structures are examined (See John 1: Gen. 1: 2). Yahweh's relationship even to the rebellious peoples of the world is expressed by language taken from the categories of Israel's salvation experience. In Genesis 3:20-22, Yahweh's providential relation to the post-flood peoples is expressed terms of *promise*.⁴⁷ In Genesis 9:1-17, Yahweh's *providential relationship* is expressed in the climax of the passage in terms of *covenant*. In this passage the behavioral boundaries of humankind even in the rebellious state are set by biblical law: "Whoever sheds the blood of man, by man shall his blood be shed; for God made man in his own image" (v.6).⁴⁸ This law controls the vendetta and was commonly known throughout the NE;⁴⁹ in the motive clause the writer reasons from creation as seen from the perspective of Israel's redemption. Creation and redemption are not conceptualized as antithetical in the Bible but as parallel. The fall is seen as antithetical to both, though even in the fall, redemption-creation sets the lower boundaries of rebellious behavior by choosing a law from the common NE law itself, and by giving its own reason for that boundary, the creation of man in the divine image.

But there is a second way by which humankind is related to Yahweh in the Genesis story. It is related to Yahweh through the Abraham people, with

whom Yahweh has established a special relationship of blessing: "And in you all families⁵⁰ of the earth shall bless themselves" (Gen. 12:1-3). God was not content to relate himself to humankind merely through a covenant of providential care. His concern was to lead humankind forward by special grace into the personal relationship of God and people. The purpose of Israel, according to this writer, was to mediate God's personal blessing to the nations.

The Abraham people are called to lead out for God in matters of public policy. This is what the gospel and biblical law are about. The most important question of public policy has to do with the laws of worship: who is sovereign. But the professed sovereignty of Yahweh means nothing unless it is decisive for human behavior. The church must therefore deal not only with religious law, but with casuistic or case law, the laws of the courts. We must bring these laws which deal with family, economic and international relationships, under the authority of God who has liberated his people from Egypt, whose altar is not built by instruments used for oppression. In this way we are called to be a kingdom of priests, a religious and moral elite, to mediate God's leadership of humankind out from the burden of kingship law, a law whose lower limits as announced in Genesis, since the development of the ultimate weapon, threatens the very existence of humankind.⁵¹

FOOTNOTES

1. These are not to be understood as codes in the modern sense. See the discussion by Richard Hasse, *Einführung in das Stadium Keilschriftlicher Rechtsquellen* (Weisbaden: Otto Harrasowitz, 1965, pp. 19f. This book is a good introduction to NE legal literature.

2. For example, see the articles by Harold J. Berman, "The Influence of Christianity upon the Development of Law," *Oklahoma Law Review*, 12 (1959), pp. 86-101, and Wilbur G. Kratz, "Christ and Law," *Ibid.*, pp. 57-66.

3. See David Daube, *Studies in Biblical Law* (Cambridge: University Press, 1947).

4. I omit here the so-called P collection of laws since they deal almost entirely with worship.

5. The Covenant code (Book of the Covenant, Ex. 24:7) is the oldest. Sonsino dates it to the thirteenth century--*Motive Clauses in Hebrew Law* (Scholars Press, 1980), p. 19. Except for 23:20-33, Paul Hanson dates it to the period of the League--"The Theological Significance of Contradiction within the Book of the Covenant," *Canon and Authority* (Fortress Press) p. 114. The Deuteronomic code is dated in its present form in the seventh century B.C.; the Holiness code, in the time of the exile.

6. See Exodus 24:7 for the term "Book of the Covenant."

7. See Brevard Childs, *Introduction to the Old Testament as Scripture* (Philadelphia: Fortress Press, 1979).

8. It is not my intention here to suggest any direct relation between these various codes. For the hazards (though importance) of comparative studies, see Hans Jochen Boecker, *Law and the Administration of Justice in the Old Testament and the Ancient East*, trans. by Jerry Moiser (Minneapolis: Augsburg Publishing House, 1980), pp. 15-19. It is obvious that biblical law is in the context of ancient Near Eastern law, but my point here is to show that biblical law deals with the same secular concerns.

9. Albert Goetze, *The Laws of Eshnunna* (New Haven Department of Antiquities of the Government of Iraq and the American Schools of Oriental Research, 1956), p. 132f.

10. See parallels, Leviticus 23:17-21; Deuteronomy 19:21.

11. James Pritchard, *Ancient Near Eastern Texts* (Princeton: Princeton University Press, 1969), p. 175. Of the four Mesopotamian codes, only CH has the law of talion. The law of Eshnunna substitutes a payment of money.

12. See the parallel, Deuteronomy 22:28-29.

13. See Pritchard, *op. cit.*, p. 185, A55. I follow here R. Yaron, "The Middle Assyrian Laws and the Bible," *Biblica* 51 (1970), p. 556.

14. See R.A.F. MacKenzie, S.J., "The Formal Aspect of Ancient Near Eastern Law," *The Seed of Wisdom*, W.E. McCullough, ed. (University of Toronto Press, 1964), pp. 33-38.

The connection of casuistic law with the actual court case was made already by Albrecht Alt, "Die Ursprünge des Israelitischen Rechts," *Kleine Schriften zur Geschichte des Volkes Israel* (München: C. H. Beck'sche Verlagsbuchhandlung, 1953), pp. 278-332. Rifat Sonsino points out that this connection cannot be proven by textual evidence.

15. The Decalogue begins with religious law but does not end with it.

16. See Martin Noth, *Exodus*, OTL (Philadelphia: The Westminster Press, 1962), pp. 162f.

17. C. R. North, *The Second Isaiah* (Oxford: Clarendon Press, 1964), pp. 14f.

18. See Boecker, *op. cit.*, p. 148.

19. See Genesis 3 and 4.

20. See Pritchard, *op. cit.*, p. 163.

21. *Ibid.*, p. 165.

22. *Ibid.*, pp. 164f., 177ff. For the war literature see D.D. Luckenbill, *The Annals of Sennacherib* (Chicago: The University of Chicago Press, 1924), pp. 23ff.

23. See Exodus 20:1,2,22-26, etc.

24. See Psalm 72; Jeremiah 22:15; 1 Samuel 30:22-25, etc. Boecker deals at length with this question, giving various viewpoints on the controversy, and examining most of the relevant texts. He holds that the O.T. refers nowhere to legislation by the king. Where this may seem to be the case, the king is dealing with soldiery, the royal court or the royal cities, all of which essentially were non-Israelite institutions. Following a study by Malchoz he quotes, "in none of the recorded cases does the kings' jurisdiction infringe on the rights reserved to the local courts. Nor does it establish itself as a superior court to which appeal could be made against decisions by the city courts"--Boecker, *op. cit.*, p. 177. For the entire argument, see pp. 40-49. An exception to the rule was Jehoshaphat's judicial reform where the king encroached on the authority of the lower courts in cases of murder (2 Chron. 19:10) but which the law again abolished (Deut. 17:8-12)--Boecker, *op. cit.*, p. 49.

25. In Deuteronomy even the laws of warfare are not oriented to kingship. See Deuteronomy 20:24.

26. There is a rather wide-spread rejection today of Martin Noth's amphictyony, a model which was taken

from the Greek city states. However, sociologists of pre-industrial societies suggest several possibilities of cross-cutting systems which might provide linkage for an administratively non-centralized people. In Israel it would appear that the tribe of the Levites was such a cross-cutting mechanism. They had no tribal territory of their own, but were scattered throughout the various tribes and were responsible for teaching Yahwism and perhaps for occasional meetings of "all Israel" (Deut. 33:3-11; Josh. 14). For a discussion, see Norman K. Gottwald, *The Tribes of Yahweh* (Maryknoll: Orbis Books, 1979), pp. 293-320; 345-375.

27. In Deuteronomy, Moses is the speaker, though he spoke "according to all that Yahweh commanded him" (Deut. 1:3). Deuteronomy is a different literary type from the Covenant and Holiness codes. Compare Joshua 23 and 1 Samuel 12.

28. Paul D. Hanson holds that Exodus 20:22-23:19 is a literary unit which can be attributed as a whole to the premonarchical period--Hanson, *op. cit.*, p. 114. Sonsino attributes it to before and after the conquest--Sonsino, *op. cit.*, p. 19. Various solutions to the problem of the law speaker have been suggested. Martin Noth has suggested that the law speaker was the minor judge. Others have held that there was a "Mosaic office" in ancient Israel. See H.J. Kraus, *Die prophetische Verkündigung des Rechts in Israel* (Ag. Zollikon: Evangelischer Verlag, 1957), pp. 3-38, who discusses these various viewpoints and who tries to find a link of the ancient "Mosaic office" with the later prophets. More recently, the "wise men" are favored, (whoever they may have been at that early time). See Sonsino, *op. cit.*, pp. 120-131. I would agree with this later writer that "The setting in life of the motivated laws...cannot be located exclusively in cultic preaching"--*Ibid.*, p. 128); however, I would hold that this was one of the most important places where this kind of activity went on. After all, the book of the law at the time of Josiah was found *in the temple*.

29. See Gerhard Liedke, *Gestalt und Bezeichnung altentestamentlicher Rechtssätze* (Neukirchener Verlag, 1971), pp. 120-134. Erhard Gerstenberger argues that the original setting for this kind of law was the patriarchal family--Gerstenberger, *Wesen und Herkunft des Apodiktische Recht* (Neukirchener Verlag, 1965), pp. 110-127. This type of law is closely related to certain forms of wisdom.

30. Shalom M. Paul, *Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law* (Leiden: E.J. Brill, 1970), p. 123.

31. Sonsino, *op. cit.*, pp. 86-96. It is difficult to determine percentages because of the complexity of the material, and thus somewhat different percentages are arrived at by different researchers.

32. *Ibid.*

33. B. Gemser, "The Importance of the Motive Clause in Old Testament Law," *Vetus Testamentum*, Supp. 1, 1964, p. 63.

34. This parallel is pointed out by Paul, *op. cit.*, pp. 106,107.

35. See Hanson, *op. cit.*, pp. 110-131.

36. Boecker, *op. cit.*, p. 183. An example of how Yahweh's action for Israel impinged on the law of capital punishment as given in Hosea 3:1.

37. See Paul, *op. cit.*, pp. 30-32.

38. See A. Leo Oppenheim, *The Assyrian Dictionary*, Vol. 8, pp. 468f.

39. This is the interpretation of the NIV translation, I think a correct one. It may be translated, "a woman."

40. This oracle is paralleled in Isaiah 2:1-4. The oracle may have been earlier than either Micah or Isaiah. See A.S. Herbert, *Isaiah 1-39* (Cambridge: University Press, 1973), p. 34.

41. See John Howard Yoder, *The Politics of Jesus* (Grand Rapids: Eerdmans Publishing Company, pp. 143-147).

42. *Ibid.*

43. I do not argue necessarily for a direct borrowing here. The Haustafeln are Colossians 3:18-4:1; Ephesians 5:21-6:9. See also 1 Peter 2:13-3:7. For a discussion see Yoder, *op. cit.*, p. 163-192. He acknowledges the dissertation by David Schroeder, "Die Haustafeln des Neuen Testaments, Ihre Herkunft und ihr theologischer Sinn" (Evangelical Theological Faculty of the University of Hamburg, 1959, unpublished).

44. I am dependent for my interpretation here upon Anton-Hermann Chroust, "The fundamental Ideas in Augustine's Philosophy of Law," *American Journal of Jurisprudence*, 18 (1973), pp. 59-78. Quote from p. 78.

45. Quoted from "Judge Bontrager Bows Out," *The Goshen News* (March 28, 1979), p. 4.

46. See note 41.

47. Traditionally ascribed to J.

48. Traditionally attributed to P.

49. See my discussion above.

50. Traditionally attributed to J; see note 46.

51. Philip Berrigan points out how laws expand and preserve empire. Such law protects atomic weaponry, making it virtually impossible for citizens to touch the problem which threatens us all. State law has literally become the "law of sin and death." See Berrigan, "Sin and the Bomb: Breaking the Imperial Law," *Pacificus Papers*, Vol. 2, No. 6, Fall, 1980 (Center on Law and Pacifism, Colorado Springs).

SOME THESES TOWARD A THEOLOGY OF LAW IN THE NEW TESTAMENT

John E. Toews

Introduction

The purpose of this article is to present some theses regarding a New Testament understanding of the law. The theses presuppose detailed exegesis which is beyond the boundaries of this paper. The theses are submitted in the hope that colleagues in the Mennonite community will test them for general faithfulness of interpretation, and test them via careful exegesis as time and expertise permit.

Three introductory comments seem appropriate before the theses are outlined. First of all, the law discussion in the New Testament has been dominated by a paradigm of interpretation which says the law was abolished or ended in Jesus, or it was so radicalized into love to be emptied of all structure and content. No law in the Christian community necessitates state law. This prevailing paradigm is under increasing critique. The critical task now is the exegesis of the New Testament law texts in historical context.

Second, the law discussion in New Testament studies is dominated by the concern for the nature and role of the Old Testament/Jewish law in the teachings of Jesus and the writings of the early disciples. Minimal concern has been given to other "law structures" in the New Testament. I want to address the dominant concern in this article, but also hint at the existence of other "law structures."

Third, it is important at the outset to understand that law language in the New Testament is

maintenance language, not entrance language. It concerns the shape and quality of life in the disciple community, not entrance into the disciple community. Salvation is always by grace through faith (the faith of Jesus and the faith of the believer), never by law observance. The latter is a function of salvation, of maintaining the life of faith, of living out the life of faith.

Thesis 1 -- The study of the law in the New Testament has been shaped by a polemic against Judaism, indeed by a fundamental anti-semitism in Western Christianity.

Law studies in the New Testament generally work off of three paradigmatic assumptions. First, Judaism post-587 BC is an illegitimate religion. The language used to describe this period is reflective of this bias, e.g., "late Judaism." The year 587, according to this presupposition, represents God's judgment on Israel. The judgment is so total that it means the end of Israel as a people and of Israelite religion. Something new emerges post-587, so new that it must be called something else, e.g., Judaism. The new which emerges post-587 is an ethical world view which cannot be called religion any more. Israelite faith was founded on trust and love for the God who rescued Israel from Egypt and made covenant with her. Judaism forgets the God of the covenant and the prophets; Israelite faith is replaced by ritualistic and legalistic piety.¹ Therefore, Judaism is not a true religion.

Second, Judaism post-587 BC is a legalistic religion. Ferdinand Weber, *System der altsynagogalen palestinischen Theologie*, articulated an interpretation in 1880 that has become paradigmatic.² Judaism is the antithesis of Christianity. It was a legalistic religion in which God was remote and inaccessible. Christianity, in contrast, is based on faith and an accessible God.

Salvation in Judaism, according to Weber, is based on works, repentance and obedience to the law.

Thus each individual's relation to God is determined by his relation to the law. But man cannot fulfill the law perfectly. God keeps records of sins and righteous deeds. Man is judged by which weighs more. The consequence is that man lives in insecurity before God; he does not know whether or not fulfillment of the law outweighs transgressions.

Because God is remote and inaccessible in Judaism the law is divorced from the covenant and from God. The law is a means of salvation, but a means unhooked from God and the covenant. Man must keep the law of a remote God, but he is incapable of fulfilling it, and he is uncertain about the relation of law fulfillment and transgressions. Therefore, the certainty of salvation is impossible in Judaism. Humanity is burdened by a legalistic religion that cannot give assurance of salvation.

The Weber thesis has been paradigmatic in New Testament scholarship. It has dominated the scholarly reading of law texts in Jewish literature and the New Testament. It has shaped the thinking of Schürer, Welhausen, Thackeray, Charles, Bousett, Strack-Billerbeck, Kittel, Bultmann, Conzelmann, etc.

Third, Judaism has been superseded and replaced by Christianity. This presupposition states that the church has supplanted Israel/Judaism as the people of God. Israel came to an end in 587 BC, and Judaism was ended in Christ. The law has been replaced by grace. The study of the law is a study of that which is inferior and was judged by God; it is a study of a system of religion that Christ ended and replaced by grace through faith.

These paradigmatic assumptions undergird nearly all Protestant interpretations of the law in the New Testament. The dominant negative interpretation of the law in the New Testament is dictated by the presuppositions of a paradigm.

Thesis 2 -- The study of the law in the New Testament must be reshaped by an immersion baptism in the literature of the Jewish people contemporary to the writers of the New Testament.

Such a study, it is proposed, will disclose at least six themes that will challenge the prevailing interpretive paradigm. First, the covenant is the soteriological category in Judaism, not doing the law. God elects Israel and makes covenant with her. All those who are members of the covenant community are saved. Membership in Israel is salvific.

Second, the law is God's great gift to Israel; it is never a burden. It is God's promise to maintain election and covenant. The law is a sign of God's grace; it marks Israel off as his beloved child. The multiplicity of laws is evidence of God's great love and his concern for the totality of life.

Third, law obedience, which is commanded, is always a condition for remaining in the covenant, never the means of earning God's grace. The distinction in Jewish literature is not "doing/not doing" the commandments, but "confessing/denying" the commandments. Those who confess the law confess the covenant, while those who deny the law deny the covenant. Confessing the law involves the intention to obey; it reflects the earnest effort to obey, and to repent and to make atonement for disobedience. The atonement system reestablishes the covenantal relationship with God, or maintains the relationship. All who confess the law will be saved. Law obedience is a great joy and privilege because of God's election. The result of confessing and obeying the law is remaining in the covenant. Denying the law means denying the God of the law, and thus denying the covenant. Denying is apostasy, and excludes one from Israel.

Fourth, law obedience as a condition for remaining in the covenant is never taught to be perfect obedience. Jewish literature gives two different

answers to the question, how much of the law needs to be obeyed? The first answer states that fifty-one percent fulfillment is required. The second says that one fulfillment is necessary. The principle is that God's quality of rewarding is greater than the quality of his punishing. God is God of mercy. He gave the law to help Israel, not to damn her. The point of sayings which exhort law obedience is to urge the people to obey the law in the context of God's mercy. It is important to maintain covenant relationship, not to earn admission to the covenant. The "completely righteous" are those who intend to keep the commandments and are very successful at it, sinning only unwittingly and occasionally (Paul was such a person according to Philippians 3). The "wholly wicked" are those who renounce the covenant, who pay no heed to God's commandments, who behave toward their fellows as if God had not commanded love of the neighbor. The righteous are not the sinless, but those who confirm the covenant.

Fifth, Jewish piety pictures the nearness, love and mercy of God. There is a significant body of prayer and liturgical literature in first century Judaism. The Jews were a genuinely pious people, and the piety is inward rather than external. The great concern is for faithfulness to God. The motive is love of the God who is near in love and mercy. Jews are exhorted to serve God whether or not there is a reward in such service because of who God is. Study of the law, in fact, is an integral part of Jewish piety. Ritual and morality are linked in Jewish piety.

Sixth, the theological problem of Judaism in the first century was the relationship of Israel to the Gentile world, especially to the God-fearers, "the righteous among the nations who have a share in the world to come." To be righteous in Judaism one must live in some form of relationship to the covenant, and there can be no covenant without Torah. Therefore, the crucial question becomes, what laws

should the Gentiles who participate in the Jewish community as "God-fearers" live by? The answer that Gentiles must observe the Noahic Laws (the seven commandments) is not stated until Maimonides in the Middle Ages. In first century Judaism there was no clear answer to the question. There existed an extensive catechism literature for God-fearers, but the relationship to the law was not clarified. It is because of this unclarity that legalism--doing works of the law to win God's favor and be counted righteous--arose as a Gentile problem, not a Jewish problem. Salvation in Judaism was for all under the covenant. But God-fearers were not under the covenant. They had to establish their relationship by the performance of works of the law. The phrase "works of the law" is not found in any Jewish text. It refers to the adoption of selected Jewish practices by Gentiles and their attempt to impose them on others as a means of self-justification. Such people were Judaizers, Gentiles wanting to live according to the Jewish way of life.³

If these proposed themes represent authentic theological insights of Jewish literature they necessitate a radical reorientation concerning the shape of first-century Judaism, and a radical rethinking of the early church's relationship to Judaism. The categories for such a "conversation" process must come out of Jewish literature itself, however, not out of a Christian interpretation of the literature or out of a Christian imagination of what the literature ought to say.

Thesis 3 -- The term "law" is a multi-valent word the valence of which must be determined in each text and context.

The prevailing paradigmatic interpretation of the term "law" suggests that *Torah* (the Hebrew word for "law") meant story and stipulation, instruction and law. The Septuagint's use of *nomos* (law) for *Torah* stressed the second half of the original meaning. *Torah* became law. *Torah* as story and instruction was lost. Furthermore, the linkage of

Torah and covenant was broken. Rabbinic Judaism stressed the latter half as well, and Torah became *halacha*. The law's linkage with the covenant was severed even further.

The prevailing paradigm again has been challenged in recent times. L. M. Pasinya has demonstrated that *nomos* in the Hellenistic age had at least the full range of meaning which Torah had, and perhaps more. *Nomos* connotes revelation and covenant rather than just law.⁴ His study must replace the conclusions of C. H. Dodd⁵ and H. Kleinnecht.⁶ D. Rössler,⁷ W. Harnisch,⁸ A. Nissen⁹ and E. P. Sanders¹⁰ support these conclusions by demonstrating that in first century BCE/CE Judaism the Torah is anchored in covenant. One's status before God is determined by one's stance to Torah as a statement of election, and not by the performance of individual commandments.

Thus *nomos* in the New Testament can refer to Judaism as a whole, the covenant of God with Israel (including the stipulations of the covenant), specific stipulations or commandments, a general norm or principle, a teaching of Jesus or the apostles. The precise meaning of the word "law" in a specific text must be determined by the context and the "word-cradle" into which it is placed by a writer. Thus a specific stipulation may be "abrogated" by Christ, but that cannot be interpreted to mean that the law as the Torah of God is set aside. Careful exegesis again becomes the critical issue. Words must be read in context to determine their meaning.

Thesis 4 -- In the teachings of Jesus the Torah of God as interpreted by the Messiah is normative for the disciple community and expresses itself most clearly in love of God and neighbor.

The center of Jesus' proclamation is the Kingdom of God. Within the context of that center, Jesus taught three things about the law. First, Jesus affirmed the permanent validity of the law (e.g., Mt. 5:17-20; Lk. 16:16-17). Jesus brings the law to fulfillment, and he does this especially in

relation to the poor and the oppressed. The law remains valid until the eschatological end of history.¹¹ The commandments are to be taught and obeyed.

Second, Jesus taught the messianic recovery and renewal of God's will in law (see Mt. 5:21-48 par. regarding the antitheses; Mk. 2:23-28 par. regarding Jesus as Lord of the Sabbath; Mk. 7:1-23 par. regarding ritual purity; Mk. 10:12-31 par. regarding the rich young ruler). The Kingdom of God involves obedience to the law correctly interpreted and understood.

Third, the essence of the law is defined as love (see Mk. 12:28-34 par. regarding the great commandments; Mk. 10:17-31 regarding the rich young ruler).

The concern for law is a function of ethics, how to live out the will of God in the world, and of ecclesiology, how to be the people of God in the world. In addition, Jesus gives the disciples a whole body of teachings and an example to obey. Jesus also outlines a process of binding and loosing for the disciple community. He instructs the ecclesia to practice ethical discernment about how to live in the world and how to make binding ethical judgments.

Thesis 5 -- The Jew/Gentile agenda is the main context for law theologizing in Paul.

Paul's central concern is not a negative disparagement of the significance of the Torah for Israel, but the assertion that the righteousness of God through the faithfulness of Jesus effects salvation for the Gentiles in fulfillment of the promise to Abraham. This means that in Jesus Christ there is both Jew and Greek. The Jews do not need to become Gentiles nor the Gentiles Jews to be members of God's redeemed people in the world. That this overall concern and mission shapes Paul's interpretation of the law is evident by the word usage of "law." Out of 84 uses of "law" in Paul's letters, 72 occur in Romans and Galatians, the two letters more preoccupied with the Jew/Gentile agenda in all of his writings.

More specifically, Paul makes at least seven theological assertions about the law. First, the law is the gift of God (Rom. 7:7ff.). Second, the law is fulfilled in Christ for Jews and Gentiles (Rom. 3-4; Gal. 3). Christ fulfills the promise to Abraham. Third, salvation is by faith, the faithfulness of God through the faithfulness of Jesus and the faith response of human beings. Salvation is not by works of the law. The law is not a factor in salvation, in entrance into the believing community (Rom. 3:21ff.; Rom. 4; Gal. 2-3). Fourth, the law is doable (Rom. 2, 4, 9:30ff.), but crippled by the flesh and the power of sin (Rom. 7:7ff.). Fifth, the law functions as a judge of human sin (Rom. 2, 5), as a multiplier of sin or a consciousness raiser of sin (Rom. 3, 5, 7), as a witness to the revelation of the righteousness of God in the faithfulness of Jesus (Rom. 3), as a tutor or teacher until the coming of Christ (Gal. 3). Sixth, the law is fulfilled by love (Rom. 13; Gal. 5). Finally, God makes law-fulfillment possible in the Spirit and in the church (Rom. 8; Gal. 5).¹²

The concern for law in Paul is a function of Christology--Christ brings the law to fulfillment--of ecclesiology--Jews and Gentiles in the church relate to the law differently, but the church is one--of ethics--Christians do the law as an expression of faith and in the power of the Spirit active in the church. In addition, Paul transmits the Jesus tradition as an authoritative word (1 Cor. 11:23ff.; Rom. 13:11 = Mt. 5:32; 1 Cor. 9:14 = Lk. 10:7), and he transmits the confession, faith and ethical norms of the early church (1 Cor. 15:3; 1 Cor. 11:2; 2 Thes. 2:15; Pastoral Letters). Paul also gave specific instructions to his converts about how to live in the church and in the world (1 Thes. 2:11; 1 Cor. 4:17, 7:17, 11:16, 14:33; Rom. 6:3, 17; Eph. 4:22-24; Col. 3:8-12). He instructed the church to follow Jesus' method of ethical discernment (1 Cor. 5). The church is not

to take its cues from the worldly system of justice, but is to formulate and administer its own in conformity with the teachings of Jesus and the new eschatological reality introduced into the world by Jesus. And, finally, Paul calls his followers to model his morality as he models the life of Jesus (the imitation texts).

Thesis 6 -- Mark, perhaps the earliest written Gospel, pictures Jesus as the authoritative interpreter of the law who affirms the validity of the law.

In Mark Jesus radicalized the law in terms of its divine intent (chs. 2, 3, 7); he does not abolish the law. Jesus affirms the validity of the Decalogue (10:17-22). Observing the Decalogue is important, but Jesus calls for living out the real spirit of the Decalogue by loving the poor neighbor. Jesus defines the essence of the law as love (10:17-31; 12:28-34).

The concern for law in Mark is a function of Christology--Jesus is the authoritative interpreter of the law--and of ecclesiology and ethics--the disciples in Mark's community are to do the law as interpreted by Jesus.

Thesis 7 -- Matthew affirms the validity of the law as the statement of the will of God, emphasizing the radicalization of the law via the interpretation of Jesus.

According to Matthew Jesus affirms the unending validity of the law in the world. In Matthew 5 the law remains in effect until the end of the world; it has practical perpetuity. Verse 18 emphasizes that not an iota will pass from the law. The coming of Jesus put a divine stamp of approval on the law and actually established it. Jesus did not contradict the law, but completed it.

When the rich young ruler wanted to know what to do to have eternal life (19:16), Jesus tells him to keep the law. For Matthew the law reveals the will of God. It is God's great and good gift to

man. It is to do the will of God in the law that one must properly understand the law.

Matthew also pictures Jesus as radicalizing the law by his interpretation of it. Two important elements are emphasized in Matthew. First, Jesus is cast in the role of the one teacher with authority who transcends Moses ("you have heard...but I say to you"). Second, the requirements laid down by Jesus exceed the demands contained in the law inasmuch as it is not only murder but even anger that is outlawed, etc. The principle by which the commandments of the Decalogue are to be interpreted is that of the intensification or radicalization of their demand.

The essence of the law, according to Matthew, is "to love one's neighbor as oneself" (19:19). It is specifically *agape* for the neighbor that is stressed as Matthew adds the words of Leviticus 19:18 to the words of the Decalogue which concern one's responsibility to fellow human beings (Deut. 5:16-20). It is through the love command that Matthew arrives at his radical understanding of the law. In the parable of the rich young ruler (ch. 19), it is the radical demand of Jesus for love which the young man is unwilling to apply to his own life.

A further emphasis in Matthew is the importance of keeping the commandments. Not only does Matthew quote five out of the ten commandments, the love commandment of Leviticus 19:18 as the summary and intensified demand of the law. He also calls for perfection (chs. 5,19), an emphasis which does not appear in the other two synoptic Gospels. The priority of the love command and the call for perfection describe the nature of the Christian life in Matthew. The interrelationship between the two probably represent the basic points of emphasis in Matthew's interpretation of the law.

The concern for law in Matthew is a function of Christology--Christ is the authoritative interpreter of the law--and of ethics--the disciples are to obey

the law as interpreted by Jesus.

In addition, Matthew calls the disciples to follow Jesus and his teachings. They are to do all that he has commanded. Matthew alone among the gospel writers records a procedure of binding and loosing. Matthew's Jesus calls the disciple community to engage in ethical discernment about how to live in the world and to make binding ethical judgments.

Thesis 8 -- Luke, contrary to the prevailing consensus that the law is of no concern to him because freedom from the law is the accepted solution to the problem of the law, articulates one of the most conservative theologies of the law in the New Testament. The law is the mark of distinction between Jews and non-Jews; it is the sign of Israel as the people of God.

Jesus views the law as permanently valid in Luke (16:16-17). He does not criticize the law or its individual stipulations in Luke, not even by way of reinterpretation as in Mark and Matthew. In addition, it is significant that: 1) there is no summary of the law in the one central command of love that defines the essence of the law; 2) the ruler rather than Jesus summarizes the law in the parable of the rich young ruler; 3) the treatment of the divorce pericope (10:1-12) avoids the renunciation of Moses; 4) the debate about ritual cleansing in Mk. 7:1-23 par. is missing in Luke. The writer reports no criticism or rejection of God's commandments in order to maintain the traditions of men (Mk. 7:8 par.). But Luke does state that the "customs from the fathers" are in harmony with the law (Acts 6:14; 21:21; 28:17); 5) there is no sabbath controversy in Luke. Jesus acts in complete accordance with the law.

Not only does Jesus affirm and keep the law in Luke. So do the Jewish Christians. They keep the law including the ritual and sabbath laws. The law is from God to Israel, not to anyone else. It cannot be broken. All must keep it, including Paul.

Luke's view of the law is part of his ecclesiology; it is the sign of the identity of the church. Jewish Christians represent the restored Israel; they are the foundation of the church. Gentile acceptance of Jesus that is not built on a Jewish nucleus is incomprehensible to Luke. That is the only way the blessings of Abraham can be extended to the nations (Abraham is the father of Jews in Luke, never of Gentiles as in Paul). The salvation of the Gentiles is part of Luke's understanding of the mission of the Jewish people. Gentiles are saved as Gentiles. For Luke the Jew and Gentile exist side by side in the church. Neither must become what the other is.

The covenant of circumcision and the promises to Israel involve Gentile participation in Israel's salvation (Acts 3:25; 13:47; 15:14-17; Lk. 2:46-47). The people of the circumcision and the law will be saved, and a people from the Gentiles will join Israel (Acts 15:14). The salvation of the Gentiles is thus in accord with the law in Acts 15. No transgression has occurred. Gentiles live as the alien in the land according to Leviticus 17-18. More cannot be imposed on the Gentiles than Moses called for.

While Luke emphasizes the importance of law observance in the church, he does not teach any kind of justification by the law. Jews and Gentiles are saved by the grace of Jesus. But this is never contrasted with adherence to the law. The church keeps the law both before and after Acts 15. After the Council all Jewish Christians, including Paul, keep the law. Paul even circumcizes one of his fellow workers immediately after the meeting (16:3; 21:15-16; 22-26). For Luke it is impossible that the law should be abrogated, replaced or conceived as belonging to a past epoch.

Luke's affirmation of the law also is evidenced in his repeated defense of Christians against the charge of apostasy against the law. There are eight such charges in Acts (6:11, 13, 14; 18:13; 21:21; 28; 25:8; 28:17). All except 21:21 come from non-

Christian Jews. They relate to three persons, Jesus, Stephen and Paul. Much of Luke's concern regarding the law deals with these charges and declarations of innocence. His aims are apologetic. It seems clear that Luke's main problem with the law does not come from within the church, but from the conflict of the church and the synagogue. Luke rejects the accusations as false and blameless. He points to evidence of complete faithfulness to the law within the church. At the same time he charges the Jews with not keeping the law and rejecting Moses.¹³

The concern for law is a function of ecclesiology in Luke. Jewish Christians are the true and restored Israel entitled to God's promises and to salvation. The salvation of the Gentiles fulfills the promises of God to Moses and the prophets. Jews are saved as Jews and Gentiles as Gentiles. Both live in the church as distinct people. Jews do not become Gentiles and Gentiles do not become Jews. Jews as Jewish Christians observe the law perfectly. Gentile Christians observe the law of the alien in the land.

Thesis 9 -- The law and law obedience for James is a good thing that expresses faith, negatively, in the avoidance of partiality, and positively, in showing covenant mercy to those in need.

The law is perfect and brings liberty in James. The doer of the law is blessed (1:25). The law is fulfilled in loving the neighbor as self (2:8). The meaning of such love is defined in vv. 1-7 as the rejection of partiality in the church, and in vv. 14-26 as showing mercy to those in need. Showing love overcomes partiality and expresses mercy, which is required of God's covenant people in the Old Testament. Law fulfillment is impossible apart from mercy. Acts of mercy triumph over judgment because God's mercy always triumphs over judgment in Judaism.

The concern for law is a function of ethics in James. It functions to express the faith in terms

of covenant mercy. Faith must be expressed in works, and works concern giving a brother or sister what they need. "Works" in James is supremely the gift of hospitality. Thus the law as love is the perfect expression of mercy.

Thesis 10 -- The writer of Hebrews defines the law narrowly as the Mosaic cult, and argues that it has been replaced by the new and better covenant of Jesus.

The text of the letter clearly defines the law in terms of the cult. The law as cult is carnal (7:16); it is weak and useless (7:18). The law of the cult is mere shadow of a coming reality which has replaced it (ch. 10). It is replaced because it is impotent to make perfect those who draw near. It is impotent because it is plural rather than singular (many sacrifices versus one sacrifice), and because it is temporal rather than eternal (offered annually rather than once for all).

The law as cult is rejected in sharp terms in the main Christological section of the letter, 7:1-10:18 (note that covenant and law occur most often in this section of the letter). But rejection of the law as cult does not involve rejection of Torah and covenant. Covenant is a central theme in Hebrews. Christ renews the covenant by replacing the law of the cult.

The concern for the law in Hebrews is a function of Christology and covenant renewal.

Thesis 11 -- The law in the Gospel of John is the gift of God that points to the fuller revelation of God in Jesus who fulfills the real intent of the law.

John's opening statement on the law provides his thesis: the law is a gift given to Moses by God, while grace and truth came through Jesus Christ (1:17). The law is a gift from God. A greater gift has now been given, the only son who alone exegetes the Father.

The law is viewed positively in John. It has a positive function to lead people to the perfect revelation in Jesus. The misunderstanding of the law by the Jews, whereby the law is considered opposed to Christ, is viewed negatively in John but not the law as such. The Jews are condemned in John, not because they put their trust in the works of the law, but because they cling to the law as the sole revelation of God and his will. They are judged because they reject Jesus in the name of their law.

The authority of Jesus is the central issue under discussion between Jesus and the Jewish authorities in John. Jesus did not deny the authority of the law, but claimed that his authority was equally divine and that it stood above the authority of the law. Thus, the sabbath controversies in John 5 and 9 center on the issue of Jesus' identity. In ch. 5 the sabbath work of Jesus is evidence that he shares in the divine activity which does not cease on the sabbath, and which points to him as the Son of God. Jesus works on the sabbath because he is one with the Father. In ch. 9 Jesus' sabbath work is a sign itself which shows that he is of divine origin, that he is one with the Father. The sabbath work of Jesus is the fulfillment of the law; it gives rise to the sabbath rest of God (5:17; 7:21-24).

The Jews violate the law in John because they do not believe in Jesus (7:17). They refuse to do the work of God because they fail to believe in Jesus (6:28ff.). They do not do the law because they seek to kill him (7:19). What is attacked and condemned by John is a false understanding of the law which opposes the law and Jesus, observance of the law and faith in Jesus. Thus the law takes on a two-fold meaning in John. First, it points to Jesus and is fulfilled by him. Second, the law as interpreted by the Jews is opposed to Jesus.¹⁴

The concern for the law in John is a function of Christology. The law points to Jesus and is fulfilled by him. It is the opponents of Jesus who abrogate the law, not the followers of Jesus.

It is the thesis of this article that the concern for law in the New Testament is a function of three theological realities. First, law is anchored in Christology. Christ fulfills, validates and renews the Torah of God. He replaces only the law of the cult. New Testament Christology affirms the law; it does not abrogate it. Christology radicalizes and expands the Torah by the new teachings of Jesus and the apostles. Second, the law is related to ecclesiology. The question of the law involves the identity of the church as a universal community of Jews and Gentiles. Jewish Christians continue to observe the Jewish Torah as Christians. Gentile Christians observe the ethical law, the law of love, as an expression of faith. Third, the law is linked to ethics. Christians are exhorted to do the law of Moses, Jesus and Paul in the Spirit and in the church as an expression of faith.

The concern for law is not a function of the abrogation or end of the law as a valid expression of the will of God for Jews and Christians. It is not a function of soteriology. Salvation is only by the grace of God and the faithfulness of Jesus, never by works of humans. The law/gospel paradigm is a non-biblical category of interpretation.

The concern for law in the New Testament is part of a larger theological agenda that centers on the triumph of God in the world via Jesus and the disciples of Jesus. Moral guidance for the people following God in Jesus does not come from the world system (the principalities and powers), the nations or man. New Testament ethics is an ethics of law, an ethics of moral structure. God calls his people to live out their faith in him in certain ways that are more faithful than other ways. An important component of New Testament law ethics is the Old Testament Torah as transmitted and interpreted by Jesus. Other important components are the life and teachings of Jesus, the life and teachings of the

apostles, the historic and ongoing ethical discernment of the church (binding and loosing). Ethics in the early church is fundamentally Jewish. It is not Catholic nor Protestant. Nor is it Mennonite. Ethics is Torah ethics, the ethics of story and stipulation, instruction and law, salvation and discipleship.

I have tried to outline an alternative way to interpret the question of the law in the New Testament, an alternative to the prevailing paradigm of interpretation. The texts used to illustrate the alternative interpretation have been chosen selectively, but hopefully they represent the central law-texts in the New Testament. Theses are statements designed to stimulate new reflection and new behavior. The case for or against the theses presented in this article must be made exegetically.

On the assumption that the alternative interpretation outlined has some validity, what does it mean for the discussion of "the Bible and law" and for the role of the Christian lawyer in North American society? I propose an additional thesis to suggest its meaning and relevancy for Mennonite involvement in the practice of law. Ethics as Torah ethics calls into question the law of the state, and proposes a radically transformed view of the state. No Torah ethics means the Christian lives only by the law of the state; that is why, I suggest, Christendom theologians argue for the abrogation of the law in Jesus and Paul. They know that the law as the law of God calls into question the cultural synthesis they feel called to defend and perpetuate.

Western law language is conservative and status quo language. The function of the law is to protect rights and freedoms. Whose rights and whose freedoms? The history of political theory and reality in the West demonstrates that "protection of rights" language means the rights of the ruling classes, of the powerful and the wealthy. Legal systems, whether natural

law or legal positivism, are designed to perpetuate what is. They argue for continuity, not for radical change, not for something fundamentally new.

Biblical law stands over against state law and theory. It articulates a new and a moral vision for the state. The state is to bring justice and righteousness and to protect the oppressed. The call for righteousness is defined as conduct that is appropriate for a particular relationship, God/man, rich/poor, etc. In every case the appropriate conduct is that the powerful liberate, "save," the powerless. State theory and law is turned on its head by biblical law. The function of law is not to protect and defend the status quo for the powerful, but to convert the powerful to aid the powerless, to bring justice and righteousness to the oppressed. State theory and law, and its legal implementors, prop up the state and its benefactors. Biblical political theory and law calls for a new vision and a new reality, a new order. The people of God are to incarnate that new order in history and to transform the old order of the world by converting the world. They are never called to prop up the world order.

The New Testament teaches that Jesus and Paul validate and renew the law for the people of God and the way of the people of God in the world. The law interpreted and radicalized by Jesus and Paul outlines another way to be in the world that stands over against all forms of state law.

The mission of Christians vis a vis the law is to teach and evangelize, to proclaim and to live out the good news that the law is an expression of salvation and righteousness, and that the law leads to justice and righteousness rather than injustice and oppression. Christians are not called to prop up the old order by helping it operate more efficiently. The problem of our time is not the problem of case load, the language of both psychologists and lawyers, but of an old order legal system. Lawyers, together

with psychologists, are in danger of serving as the gurus of modern narcissistic man/woman who realizes that the world turned in on the self is collapsing; he wants someone to hold his hand and tell him that he and his rights can be protected, that life can go on with minimal change.

Biblical law says there is an alternative. But it is an alternative for converted people only, people who fundamentally change their loyalties and values, people who confess that Jesus is center and Lord. For such people there is a way of Torah that is joyous and righteous, that liberates and uplifts.

The task of Christian lawyers in North American society is to preach to and advocate for the sinner, to and for the oppressed in the name of God's Torah. Their counsel to the rich benefactors seeking the maximum protection of rights and property under the law is the word of Jesus to the rich young ruler, "sell, follow, and help the poor."

FOOTNOTES

¹For a much more comprehensive narration and details concerning these assumptions, see E. P. Sanders, *Paul and Palestinian Judaism* (Philadelphia, 1977), and Charlotte Klein, *Anti-Judaism in Christian Theology* (Philadelphia, 1978).

²Weber's 1880 interpretation is most accessible in the revised edition, *Jüdische Theologie auf Grund des Talmud und verwandter Schriften* (Leipzig, 1897).

³See the following for more details and literature: E. P. Sanders, *Paul*, pp. 33-430; E. P. Sanders, "The Covenant as a Soteriological Category and the Nature of Salvation in Palestinian and Hellenistic Judaism," *Jews, Greeks and Christians*, R. Hamerton-Kelly and R. Scoggs, eds. (Leiden, 1976), pp. 11-44; E. P. Sanders, "On the Question of Fulfilling the Law in Paul and Judaism." *Doncum Gentilicium*, C. K. Barrett, E. Bammel, W. D. Davies, eds. (Oxford, 1978), pp. 103-126; W. D. Davies, "From Schweitzer to Scholem: Reflections on Sabbatai Svi," *Journal of Biblical Literature*, 95 (1976), 529-558; L. Gaston, "Paul and the Torah," *Antisemitism and the Foundations of Christianity*, A. Davies, ed. (Paulist Press, 1979), pp. 48-71.

⁴L. M. Pasinya, *La Notion de Nomos dans le Pentateuque Grec* (Rome, 1973).

⁵*The Bible and the Greeks* (London, 1935).

⁶TDNT, IV, 1022-59.

⁷*Gestz und Geschichte* (Neukirchen, 1960).

⁸W. Harnisch, *Verhängnis und Verheissung der Geschichte* (Göttingen, 1969).

⁹"Tora und Geschichte in Spätjudentum," *Novum Testamentum*, 9 (1967), 241-277; *Gott und der Nächste im antiken Judentum* (Tübingen, 1974).

¹⁰"Covenant as Soteriological Category."

¹¹Contra most exegetes who argue that the law is ended with the death and resurrection of Jesus. See, for example, R. Banks, *Jesus and the Law in the Synoptic Tradition* (Cambridge, 1975), and J. P. Meier, *Law and History in Matthew's Gospel* (Rome, 1976).

¹²See the following for an affirmative interpretation of the law texts in Paul over against the more negative reading of the traditional interpretation: M. Barth, "Christ and Law," *Oklahoma Law Review*, 12 (1959), 67-85; M. Barth, "Die Stellung des Paulus zu Gesetz und Ordnung," *Evangelische Theologie*, 33 (1973), 496-526; M. Barth, *Ephesians*, vol. 1 (New York, 1974), 287ff.; C. E. B. Cranfield, *The Epistle to the Romans*, vol. 2 (Edinburgh, 1979), 845-862; W. D. Davies, "Paul and the Law: Reflections on Pitfalls in Interpretation," *Hastings Law Journal*, 29 (1978), 1459-1504; Gaston, "Paul and the Torah"; G. Howard, *Paul: Crisis in Galatia* (Cambridge, 1979); R. Longenecker, *Paul, the Apostle of Liberty* (New York, 1964); J. A. Sanders, "Torah and Paul," *God's Christ and His People*, J. Jervell and W. Meeks, eds. (Oslo, 1977) pp. 132-140; K. Stendahl, *Paul Among Jews and Gentiles* (Philadelphia, 1976); J. E. Toews, "The Law in Paul's Letter to the Romans," Diss. Northwestern University, 1977.

¹³See J. Jervell, *Luke and the People of God* (Minneapolis, 1972), for the initial statement of a similar thesis in recent times.

¹⁴See S. Pancaro, *The Law in the Fourth Gospel* (Leiden, 1957), for a detailed study of the law in the Fourth Gospel.

THE PROBLEM OF LAW DURING THE PROTESTANT REFORMATION

Thomas N. Finger

The Protestant Reformation was by no means a purely religious movement. During the centuries which preceded it, the Roman Catholic Church had become inextricably interwoven with the very fabric of European society. Bishops, cardinals and popes often exerted weighty influence over "secular" affairs, while mayors, kings and emperors were sworn to protect and assist the church. In adjudicating legal matters, one frequently had to take the intricacies of both canon and civil law into account, as well as the complex interrelationship of ecclesiastical and civil courts. For these reasons, when the Protestant Reformers began to challenge the teachings and structure of the Catholic Church, they began criticizing and transforming the very structure of society as well.

Consequently, all the leaders of the Reformation found themselves continuously occupied with issues of government, economics, revolution, war and law. When they struggled to grasp the meaning of "the gospel" in a new way, they also had to ponder afresh the significance of "the law." Now the term "law" had two distinguishable--yet closely interrelated--senses. On one hand, there was the more strictly religious and highly *personal* sense of law: as when St. Paul, for example, wrote that we are "not justified by the works of the law but through faith in Jesus Christ (or, through the faithfulness of Jesus Christ)" (Gal. 2:16). On the other hand, there was the *public* sense of law: as those statutes which guide corporate human existence. Again and again throughout this paper, we shall see how interrelated

these two senses or dimensions of "law" actually were. Indeed, one main challenge for understanding Reformation times, and for applying their significance to our own, will consist precisely in reflecting on the interface between the personal and public dimensions of law.

In Reformation times, theologians often spoke of a "three-fold use of the law." Law, that is, was commonly held to have three main functions: what we might call a condemning or *prosecuting* function, a *teaching* or *pedagogical* function, and a *political* function. The "prosecuting" activity of the law, as we shall shortly see, referred to the way in which it functioned in one's *personal* relationship with God. Its "political" function, obviously, operated in the *public* sphere. And in its "pedagogical" use, law could be said to operate either in the personal or the public dimension or both, depending on which theologian you were consulting.

In our study, we will examine in turn the views of law held by each of the three major Reformation groups: the Lutheran, as expressed by Martin Luther himself; the Reformed, as represented by John Calvin; and the Anabaptist, which we will have to glean from a number of writers. We will handle each by exploring their teachings on the prosecuting, pedagogical and political uses of the law. From these investigations, we shall see that the major movements of Reformation times provide us with certain models suggesting how the *personal* (or religious) dimension of law might be related to its *public* function. Since all of us are concerned about this connection, we will raise several suggestions concerning the relevance of each of these models for today.

Martin Luther's View of Law

For Martin Luther, the first, or "prosecuting" function of God's law was its chief one. By the term "prosecuting" (the Latin term is *elenchthicus*),

I intend to indicate the way in which God's law accuses, condemns and drives to despair the individual who cannot live up to its demands. To make this clear, we must try to appreciate the vivid and intense religious struggles which Martin Luther experienced. Luther thought that all genuine Christians would undergo similar struggles, though perhaps not as agonizing and lengthy as his. Luther described his own experience in this way:

I was always thinking, when will you do enough that God may be gracious? Such thoughts drove me to the monastery...I went into the cloister that I might not be lost but might have eternal life...In the cloister we had enough to eat and drink but we had suffering and torment in heart and conscience...I was often terrified at the name of Jesus. The sight of a crucifix was like lightening to me and when his name was spoken I would rather have heard that of the devil, because I thought I must do good works until Christ because of them became friendly and gracious to me...I greatly longed to understand Paul's Epistle to the Romans and nothing stood in the way but that one expression, "the justice of God," because I took it to mean that justice whereby God is just and deals justly in punishing the unjust. My situation was that, although an impeccable monk, I stood before God as a sinner troubled in conscience and I had no confidence that my merit would assuage him. Therefore I did not love a just and angry God, but rather hated and murmured against Him. Yet I clung to the dear Paul and had a great yearning to know what he meant.

Night and day I pondered until
I saw the connection between the
justice of God and the statement
that "the just shall live by faith."
Then I grasped that the justice of
God is that righteousness by which
through grace and sheer mercy God
justifies us through faith.
Thereupon I felt myself to be
reborn and to have gone through
open doors into paradise.

Although "law" does not occur in the preceding passage, Luther is speaking of the same reality when he refers to "the justice of God" in its threatening sense. According to Luther, God's law, as given in the Old Testament, commanded that everyone perform certain good works. If they perform these works, they attain God's favor and blessing. If not, they justly incur God's wrath and punishment (cf. Gal. 3:10-12). Luther believed that Paul the apostle, when he was Saul the Pharisee, had set out to earn God's favor in this way, but that Paul found that the harder he tried to obey the Old Testament law, the further away God seemed. (This is how Luther understood Romans, chapter 7.) For whenever Paul sought to perform the law's demands, he experienced not increasing success, but increasing awareness as to how often he failed. The more he endeavored to obey the law, the more Paul became aware of his sin. Finally, he utterly despaired of overcoming his sinful tendencies, and of escaping God's judgment (cf. Rom. 7:24).

Luther felt that his own activities as a monk had led him along the same path. The harder Luther tried to satisfy God's demands--through vigils, fasting, penance, pilgrimages--the more acutely he sensed his inability to do so. Of course, Luther was not attempting to obey the literal Mosaic law. But he felt he was operating according to the principle which underlay that law: that God's favor can be earned through performing what God requires.

Luther felt that every person, at bottom, really sets out to approach God in this way,

Further, for Luther, "the law" is not merely a set of principles. The law, in addition, is an almost personal force or Power. First, it entices one to earn God's blessings by following it. But then the law mercilessly berates, threatens, accuses and condemns the individual who fails. And if this prosecuting function of the law is carried to completion, it leaves sinners wholly convinced of their inability to attain God's favor. In this function, then, the law is an accuser,² a bitter enemy from which Christ must rescue us.

However, precisely at this point, when the law has apparently driven the individual as far from God as possible--just here, paradoxically, God can bring the whole process to a positive conclusion, for now the sinner cries in despair for God's mercy. And it is exactly at this point, and only at this point, that one is ready to receive it. For, according to Luther, it is only when we have been wholly convinced of our own sinfulness that we are open to receive God's grace. For this grace always comes³ as a free gift, and never as something we can earn.

In this first, or prosecuting function, the law operates not in the public sphere, but in the personal, religious life. It does not really function as a norm for Christian conduct. For the aim of this prosecuting function is not to exhort Christians to behave in God-pleasing ways, but to convince them that they cannot do so through their own effort.

Luther spoke similarly of conscience. Most Catholic theologians regarded conscience and law as fairly direct avenues for understanding God's will and moving towards salvation. But for Luther, conscience was primarily an actor, an accuser. Before we yield to God, conscience vilifies and condemns us. Yet paradoxically, once we have accepted God's grace, conscience keeps on doing the same.

Throughout his life, Luther was frequently tormented by his conscience. Consequently, conscience could hardly be a reliable guide for determining God's will. Like the law in its first use, conscience is an enemy from which God must rescue us.⁴

On somewhat different grounds, Luther rejected reason as a guide for understanding God's character or will. Whereas conscience accused individuals and tore them down, reason filled them with pride. Reason, by assuming that it could penetrate the mysteries of God, prevented that humility and sense of desperate need which alone could bring salvation. When he was dealing with the personal religious life, then, Martin Luther rejected the ways which Catholicism had regarded as avenues of approach to God: law, conscience and reason.

We should hardly be surprised to learn that Luther downplayed the second or pedagogical use of the law. In fact, many scholars question whether Luther ever taught such a use at all.⁵ For the pedagogical or teaching function of the law, is precisely that of providing a norm or model for Christian life. To be sure, Luther insisted that those who were humbled through the law's prosecuting function would eventually produce good works. And he could occasionally use exhortations from the Old Testament law to encourage this.

However, Luther insisted that when we truly hear the law in its prosecuting function, we realize that our apparent good deeds, and those of others, are usually hypocritical. On the surface, they may appear to be in accord with God's will. But, at the deepest level, they spring from hearts that are avoiding submission to God. Therefore, it is dangerous to lay too much emphasis on good works. For the performance of good works is the chief way in which people attempt to cover up--from others and even from themselves--the fact that they really are not right with God. To repeatedly stress the importance of following the "law" in the personal life, then, is to strengthen people in their hypocrisy and re-

sistance to a heart-felt relationship with God.

In its third use, its political use, the law provides norms for public life. This is what lawyers usually mean by "law." From what we have said, we might suppose that Luther would reject any such political function. For if emphasizing law in the personal sphere produced an outward appearance of goodness while hardening one's resistance to God--might not the same thing occur in the political sphere? Might not a public insistence on obeying laws create societies where people conformed outwardly to given norms, but learned to evade, despise and undermine them whenever they could? And if the church stressed that public "law and order" were God's law and order, might not this confirm the illusion that good citizens were good Christians, and hide the need for deeper personal transformation?

However, what Luther eliminated from the *personal* sphere, he restored in the *public*. We find Luther insisting that, in human social existence, there is such a thing as a natural law. This law contains the principles of justice and equity necessary for social order. Luther can speak of this law as being known through *reason* and also as engraved on everyone's heart. He also claims that Christians, through their *consciences* are able to apply this law in creative ways to follow God's commands in specific situations.⁶

Luther, however, did not think of this natural law as fundamentally different from that law which presses and accuses us in its prosecuting function. Both, in his view, are the *same*--through this one law *functions* in two very different ways.

In its political use, this law can guide individuals and nations wholly apart from Christian revelation. Consequently, Luther claims, Christ did not need to give any instruction about public life: "Christ's words and doctrine must not be interpreted as though He had wanted to teach and

ordain anything in addition to this or to institute anything better."

Luther often spoke as if Jesus' more "radical" teachings, such as those in the Sermon on the Mount, were simply expressions of this natural law. For the natural law can be summarized in the Golden Rule (Mt. 7:12, Lk. 6:31). And the actions commended in the Sermon on the Mount--suffering injustice and not taking revenge--are simply expressions of love of God and neighbor.

However, in other places Luther speaks of Christ as having deepened and supplemented this law.⁹ When the Peasant's war broke out in 1524-1525, Luther admonished the peasants to obey not only "natural law and all equity" but also "Christian law and the gospel." What was this "Christian law" which apparently went beyond the natural law? Luther replies: "Suffering! suffering! Cross! cross! This and nothing else is the Christian law."¹⁰ At least on this occasion, Luther felt that Christ's way of suffering love went beyond anything found in natural law.

Nevertheless, Luther did not intend that this law of suffering and nonretaliation, whether part of the natural law or not, find expression in the political use of the law. Luther directed such admonitions only to the peasants and never to their rulers, who were repressing them with barbaric ferocity. For in Luther's theology, the political use of the law was highly influenced by his well-known theory of "two Kingdoms." Luther held that there is, first of all, a "Kingdom of Christ," in which Christ exercises his rule over the spiritual lives of Christians. Here

The only power at work is the power of the Spirit which overcomes the heart and brings it to faith. Thus the constitutive element is freedom. Force is not used in this kingdom; rather,

everything takes place voluntarily
through the compelling power of the
Spirit...¹¹

Accordingly, in so far as I belong to Christ's kingdom--insofar as I relate to others as a Christian on a personal basis--I forgive all offenses, never take revenge, and try to resolve conflicts in love.

But God rules the world through a second kingdom; a "secular Kingdom." "Christ does not participate in this secular kingdom. God--and not Christ--institutes it."¹³ This "secular Kingdom" governs humanity's social and political affairs. Here force and compulsion are necessary to maintain order. Here offenses must not be forgiven, but must be punished by the law. So if I am maligned or robbed, I, as a citizen of the secular Kingdom, should seek my adversary's trial and punishment to preserve social order.

Luther believed that God instituted governments primarily to preserve the world from chaos. Like John Calvin, Martin Luther had a very low opinion of human goodness. For had humanity's tendencies been allowed to operate unchecked by coercion or threat of coercion, human life would long ago have been obliterated. Nevertheless, Luther also held that governments and laws exercise some positive function in promoting well-being and prosperity.

Now since the principles governing this secular kingdom are clear to everyone--Christian and pagan alike--Christians who administer it act much as everyone else does. A Christian lawyer, for example, would not operate out of a fundamentally different view of justice. To be sure, a Christian judge might temper a particular decision with a bit more mercy. But the Christian's understanding of the fundamental nature of law, of its goals and values, would be the same as everyone else's.

Further, Luther insisted that the attitude of ordinary Christians toward their rulers must be one

of obedience. For even if they rule in unjust ways, the present political authorities were given their positions by God. Occasionally the Church through her ministers might verbally challenge or reprimand the rulers, as Luther himself criticized the nobles during the Peasant War. But the task of ordinary Christians was simply that of obedience to the law in its political use.

Before we leave Martin Luther, let us observe how his theology abounds in paradox. God's wrath crushes us to the earth and damns us, while God's grace uplifts and pardons us. Yet the same law which accuses and condemns us in its *prosecuting* use, and which is seldom--if ever--recommended in any *pedagogical* use, must be absolutely obeyed in its *political* use. The same offender whom I should pardon and help insofar as I belong to Christ's Kingdom, I should surrender to the authorities insofar as I belong to the secular Kingdom.

Yet many regard such paradoxes as strengths and not weaknesses in Luther's theology, for our religious experience, and life as a whole, is not always unambiguous. A certain tension does exist between God's wrath and God's love. And, like it or not, a real tension does exist between our *personal* religious lives and our *public* role in society.

Martin Luther's acknowledgment of this latter tension has profoundly influenced the development of modern civilization. For it sanctioned and hastened the process of secularization whereby so many areas of life--government, science, economics, law--were emancipated from the control of the church. Politicians, scientists, merchants, lawyers--all were allowed to explore their fields of activity and conduct them on basis of reason freed from religion's control. And, many would argue, it is due to this secularization that these enterprises have advanced so remarkably since the Middle Ages.

Luther's approach to law allows one to remain a Christian in an intense, personal way and yet to

function in the legal profession freed of religion's considerations. This is the distinctive feature of his view of law--and its great strength or weakness, depending on your perspective.

John Calvin's View of Law

When we turn from Martin Luther to John Calvin, it is of no small consequence that the latter was trained as a lawyer. As the leading reformer of Geneva, Switzerland, he devoted much effort to shaping the social and political life of that city. Moreover, confronted with the flurry of new ideas bursting forth during the Reformation, Calvin's sharp, precise mind sought to arrange them into some orderly system. His *Institutes of the Christian Religion*, first published when Calvin was 27, was revised and expanded nine times. But its fundamental ideas remained the same throughout. Consequently, while Luther's remarks on law must be gleaned from sermons, addresses and pamphlets scattered throughout 50 volumes of collected writings, Calvin's central thoughts can be found within the covers of one work. And this difference in literary form aptly expresses a fundamental difference between the two reformers. While Luther's comments on the uses of the law abound with paradox and apparent inconsistency, Calvin interrelates the three uses of the law in a more coherent way, which is far more appealing to most lawyers (and theologians).

As far as the first, or prosecuting use of the law goes, Calvin is in substantial agreement with Luther. In this use, the law

warns, informs, convicts, and lastly condemns every man of his own unrighteousness. For man, blinded and drunk with self-love, must be compelled to know and to confess his own feebleness and impurity. If man is not convinced of his own vanity, he is puffed up with insane confidence in his own mental powers, and can never be induced to

recognize their slenderness as long as he measures them by a measure of his own choice. But as soon as he begins to compare his powers with the difficulty of the law, he has something to diminish his bravado.¹⁴

So the law goes to work on the individual. Its demands challenge area after area of life where one feels upright, and drag one's secret motives and sins into its searching spotlight. Yet the ultimate purpose of this process is positive. It is, in Calvin's words, that sinners,

dismissing the stupid opinion of their own strength, they come to realize that they stand and are upheld by God's hand alone; that, naked and emptyhanded, they flee to his mercy, repose entirely in it, hide deep within it, and seize upon it alone for righteousness and merit...In the precepts of the law, God is but the rewarder of perfect righteousness, which all of us lack, and conversely, the severe judge of evil deeds. But in Christ his face shines, full of grace and gentleness, even upon us poor and unworthy sinners (357).

Although Calvin's language sounds a lot like Luther's, his overall emphasis is different. The writings of Luther, who was primarily a preacher, pastor and polemicist, abound with personal references to the terrors, struggles and joys of personal religious experience. But Calvin, the trained lawyer, was almost entirely silent about such things. For Luther, the first, or prosecuting, use of the law was its primary function. But for Calvin, the second or pedagogical use which Luther seldom or never mentioned took priority.

Calvin insists that we cannot look at the Old Testament law simply as a set of rules dealing with various activities. If we wish to understand anything about the law, we must grasp the overall purpose for which God gave it (349, 362). If we look at the Mosaic law in this way, we can interpret the term "law" in a fairly broad manner.

Calvin claims that the law's chief purpose was--and still is--"to form human life to the archetype of divine purity..." (415); "no one," Calvin insists, "can deny that a perfect pattern of righteousness stands forth in the law" (362). Calvin defines "law" to include the entire "form of religion handed down by God through Moses" (348). Accordingly, the law includes not only precepts, which by themselves might be unattainable and cause despair, but also God's promise of grace (361, 424-425).

For these reasons, the Old Testament law retains a valuable pedagogical function for Christians today. It is the best means for learning God's will day by day. The law exhorts us to personal growth. By frequent meditation on it we may "be aroused to obedience, be strengthened in it, and be drawn back from the slippery path of transgression" (360-361). However, Calvin--although not so much as Luther--held a rather pessimistic opinion of the regenerated Christian's capacity for renewed living. Consequently, he insisted, "the law is to the flesh like a whip to an idle and balky ass, to arouse it to work" (361).

Calvin's broad understanding of the Old Testament law, which enabled him to grant it an important pedagogical function, enabled him to move smoothly into the law's third, or political, function. Like Luther, Calvin wanted to avoid any sharp distinctions among the natural law, the Mosaic law, and the teachings of Christ. Calvin was acutely aware that some, like the Anabaptists, insisted that Jesus taught a higher ethic than the Old Testament. For example, whereas the Old Testament forbade murder, Christ

forbids taking oaths at all; whereas the Old Testament allowed hatred of enemies, Jesus commands love of enemies (Mt. 5:21-24, 33-37, 43-47). In general, the Anabaptists would say that the Old Testament law deals only with actions, but Jesus with the underlying attitudes. Calvin disagrees. We cannot appropriately consider the law without considering the law-giver and his overall purpose. And since God is a spiritual lawgiver, and his ultimate purposes are spiritual, even the Old Testament law must speak to inner attitudes as well as to external behavior (372).

Calvin uses this principle to deny, for example, that Jesus' teachings on love of enemies were unique. After all, the Old Testament commands us to feed our enemies if they are hungry (Prov. 25:21); to assist them when their animals stray or are overburdened (Ex. 23:4-5); to leave vengeance in God's hands (Deut. 32:35; Lev. 19:18, *Institutes*, 419; Calvin's exegesis on the last point is somewhat questionable). Furthermore, Calvin disagrees with the Anabaptists, who say that Christ forbade taking oaths. Calvin's immediate response is instructive: "in this way they heedlessly dash against Christ, making him the Father's enemy as if he had come down to earth to set aside God's decrees" (391). In other words, Calvin appears to instinctively reject this possibility, because it would allow the New Testament to say something distinctively new over against the Old. However, he recognizes that this response is not entirely sufficient. Calvin goes on to argue that Jesus forbade swearing oaths *in vain*--not swearing oaths in general (391-394).

Anabaptists did not only refuse to take oaths. They also held that Christians should never go to court. For this they could cite the apparently unique New Testament teaching in 1 Corinthians 6:1-8. But this, in Calvin's eyes, meant wholesale rejection of the judicial process.

Calvin responded by stressing that Christians should never go to court with hatred for their adversaries in their hearts--although he candidly confessed that this hardly ever occurs (1506-1507). Calvin also recognized that outright theft can be carried out by technically legal means. Moreover he also acknowledged, like Luther, that there are cases where Christians "as we are instructed by Christ...will so suffer their body to be maimed, and their possessions to be maliciously seized, that they will forgive and voluntarily pardon those wrongs as soon as they have been inflicted upon them (Mt. 5:38ff)" (1508).

Despite all this, Calvin insisted that at times Christians ought to go to court. They can call upon the judicial processes to help them preserve their own possessions; they will demand "the punishment of a guilty and pestilent man who, they know, can be changed only by death" (1508). And their basic *rationale* for doing this will not arise from their own self-interest, but from the necessity of supporting the judicial process and preserving public order. For "the help of the magistrate is a holy gift of God..."; "we must consider that the magistrate's revenge is not man's but God's..." (1507-1508).

Calvin's views on oaths and courts place us at the heart of his perspective on the third, or political, use of the law. As we have seen, his approach is largely based on a hermeneutic which searches for the broadest purpose behind any Old Testament law. This enables him to find much continuity between the Old Testament and the New. Consequently, Calvin can regard the Ten Commandments as the basis of all social order. For when we discuss any one of them, he argues, we need not restrict ourselves to its bare working, but must search for the deeper purpose behind it (374-375).

Calvin ponders the fifth commandment, "Honor your father and mother that you may be long-lived

on the land which Jehovah your God shall give you" (Ex. 20:12). The broad meaning of this command, he claims, is that God has set up certain persons--not only parents, but those with superior political authority or social status--whom we are to revere and obey (375, 401). However, Calvin feels that "this precept of subjection strongly conflicts with the depravity of human nature which, swollen with the longing for lofty position, bears subjection grudgingly" (401). Accordingly, Calvin insists that all civil authority is "holy...most sacred and by far the most honorable of all callings in the whole life of mortal men" (1490). For, even if their actions be entirely contrary to God's purposes, civil rulers "bear...a character upon which God has imprinted and engraved an inviolable majesty" (1516; cf. 401-402).

Calvin, then, insists on submission to public law and order. However, he is aware that such outward submission does not involve true moral righteousness among those whose hearts have not been changed by grace. For most people, Calvin admits, "the more they restrain themselves, the more strongly they are inflamed: they burn and boil within, and are ready to do anything or burst forth anywhere--but for the fact that this dread of the law hinders them" (358).

Calvin finds this general principle of submission to authority taught not only in the Old and New Testaments, but in "natural law" as well. Like Martin Luther, John Calvin holds that the essential principles of natural law are known to people everywhere (1503, 272). Accordingly, all nations have been able to make reasonably good laws without recourse to specific Old Testament precepts (1503). Calvin, like Luther, speaks of two kingdoms: one which is spiritual and concerns the inner life; another which is political and concerns earthly affairs and outward behavior. Calvin insists, "These two...must always be examined separately... There are in man, so to speak, two worlds, over

which different kings and different laws have authority" (847).

It may seem as if Calvin's view of the law's political function is much like Luther's. However, careful examination discloses significant differences. Despite Calvin's statements about the distinctions of the earthly and heavenly kingdoms, he can also say that "certain beginnings of the Heavenly Kingdom" are already present "upon earth" (1487). To be sure, Calvin, like Luther, normally counsels obedience even to very evil rulers. To resist the rule of the magistrate is to "cast off God that he may not reign..." (1492; esp. 1517). Nevertheless, Calvin sometimes remarks--though not too often, it is true--that leaders who lead us to transgress the law are not really acting as the "parents" of the fifth commandment; but they are "strangers who are trying to lead us away from obedience to our true Father" (404). At the very end of his *Institutes* Calvin insists that it is the duty of lower ranking civil officials to help restrain despots (1518-1519).

Moreover, though Calvin argues that nations normally can devise adequate civil laws from natural law alone, he remarks that some statutes conflict so sharply with it that they cannot be regarded as laws (1503). This reminds us of his remarks on legal procedures in general. Though he upheld the legitimacy and importance of the legal process, Calvin recognized that legal cases are often waged from highly unworthy motives; and legal processes can be used to legitimize theft and social oppression (409-410).

In instances like these, we glimpse an important distinction between Luther and Calvin--a distinction which was often very subtle, but which, over the centuries, engendered significant contrasts between the Lutheran and Reformed traditions. For Luther, the *public* sphere of existence operated according to its own laws and structures, largely independent

of the *personal* sphere of religious faith. Luther, we remember, could sub-divide the one law of God into its two highly paradoxical functions, and allow each one to operate largely unhindered by the other.

But a single, more broadly inclusive view of the law is at the center of Calvin's vision. It is the natural law engraved on the hearts of all peoples, given specific form in Moses' Ten Commandments, and expounded in depth and clarity by Christ. To be sure, God can use this law to prosecute the consciences of sinners, to bring them to acknowledge their need for grace. But once the individual has been justified, the law loses this prosecuting power. Henceforth it operates as "the perfect pattern of righteousness..." (362). And this pattern includes norms for public as well as personal behavior.

John Calvin, then, offers the contemporary Christian the possibility of thinking more consistently of one law which guides both personal and public activity. We can think of this law as being known more clearly in individual and congregational Christian life; and as being grasped much more obscurely and partially in public life. Indeed, the task of Christians in public life might be to transform its laws and legal procedures according to the explicit vision of the kingdom which they have through Christ.

The strength of Calvin's position--or its weakness, depending on your viewpoint--is the consistency and harmony among the various uses of the law. He reduces the acute tension we found in Luther. Nevertheless, we must ask whether John Calvin has obtained this consistency at too great a price. We must ask whether the Old Testament laws and any so-called "natural law" really do blend in so smoothly with the teachings of Jesus Christ. Or might there be, in fact, something unique and unsettling about the latter? Might not Christ come into conflict with even some of the best laws of

the Old Testament and of the nations? And might being a Christian involve coming into conflict with them too? It is this sharp question which the Anabaptists raised.

The Anabaptist View of the Law

We already mentioned that it is easier to interpret the views of John Calvin, which are generally consistent and which are found in one systematic work, than those of Martin Luther, which are often paradoxical and scattered throughout numerous works. But compared to deciphering the views of the Anabaptists, interpreting Luther is fairly smooth sailing. There are several reasons for this. First, there is no major spokesman for Anabaptism. Differences among Anabaptism's leading thinkers are sometimes quite significant. Second, many Anabaptist leaders were killed when fairly young. Third, even those who were able to do significant writing were under frequent persecution. Much of their lives was spent on the move or in hiding. With a price on their heads, they seldom had opportunity for discussion with theologians of other persuasions or access to theological writings. Fourth, much of what they did manage to write was confiscated and destroyed. Accordingly, we hardly have the sources from which to confidently construct *the* Anabaptist view of law. Nevertheless, when we compare what we know of Anabaptist thought and practice with those of Luther and of Calvin, some interesting results emerge.

In regard to the first, or prosecuting use of the law, we find a fair amount of agreement among the three major Reformation movements. According to a very early text, often attributed to Michael Sattler, there are two kinds of obedience towards God. Servile obedience is done out of concern for one's self and hope of reward. Filial obedience is done out of love for God with no thought of reward. Nevertheless, despite the gaping difference between the two, servile obedience is not wholly

contrary to filial obedience, but can be a preparation for it. In fact, servile obedience is "the old covenant," "the Law." And

The servile was instituted to reveal and to increase sin....For if man is ever to escape from sin, he must hate it. If he is to hate it he must first know it. If he is to know it, there must be something which stirs up the hidden sin, and makes it known. Such is the Law...¹⁵

According to Menno Simons, true Christian faith is focused on "the threatening Law as well as the comforting Gospel..." In this process,

the heart is pierced and moved through the Holy Ghost with an unusual regenerating, renewing, vivifying power, which produces first of all the fear of God. For it acknowledged the judgment and wrath of the Lord over all transgressions and sins...It becomes affrighted, fears, and is amazed before God and therefore does not do, counsel, or agree to anything which...God, the righteous judge, hates in His soul¹⁶ and has forbidden in His holy Word.

Now in contrast to Luther and Calvin, the Anabaptist leaders generally held a "higher" view of the human will and its freedom to respond positively to God. The former insisted that the will is wholly bound by sin. It cannot even respond to grace unless the Holy Spirit so empowers it. In contrast, the Anabaptists usually spoke of some remaining capacity to respond freely to God's grace. In fact, Pilgram Marpeck and Leonhard Schiemer seem to have held that such a point of contact consisted in a certain awareness of natural law, which everyone possesses.¹⁷

Because of this difference on the issue of "the freedom of the will," it is sometimes supposed

that, whereas Lutherans and Calvinists insisted that sinners must be broken by the law before they received grace, the Anabaptists envisioned people responding joyously and spontaneously to grace, unencumbered by such terrors.

Sixteenth century Anabaptist references to "the law," however, hardly support any such distinction. For all three Reform movements, the sinful human will was in rebellion against a wrathful God. It normally had to be broken by the law in its first, or prosecuting, function before it was ready to receive grace.

The chief difference between Anabaptism on one hand, and Lutheran and Reformed Protestantism on the other, lay primarily in what occurred *after* one came to faith. For Luther, the law's prosecuting function continued throughout a Christian's life: for if we are to remain truly open to grace, we must again and again be reminded of our sinfulness. Calvin expected Christians to make more consistent progress in Christian virtue. Thus he granted the law's pedagogical function the leading role in the Christian life. Yet Calvin expected this progress to be slow and highly imperfect. As we have seen, he expected the law to work "like a whip to an idle and balky ass, to arouse it to work."

The Anabaptists, however, expected something different to result from grace. According to Menno, once the "unusual regenerating, renewing, vivifying power" of the Holy Spirit has broken sinners through the law, it engenders God's love within us. And this "constraining power of love" moves ^{us} "to obedience to all the commandments of God,"¹⁸ It "moves, changes, urges and constrains a man so that he will always hate the evil, and gladly do the things which are right and good."¹⁹

Now since we are following the Reformation schema of the three-fold use of the law, we should expect the Anabaptists to say something about the second, or pedagogical, use of the law at this point. But

so far as I am aware, they really do not speak of such a use. There seems to be both a "negative" and a "positive" reason for this.

On the "negative" side, the Anabaptists simply do not speak of the sort of continuity between the Old Testament law and the Christian gospel which Calvin proposed. According to Pilgram Marpeck, the function of Mosaic law throughout the entire Old Testament era was to increase awareness of sin "that it might kill and institute wrath until the time of Christ."²⁰ The Old Testament saints did not receive the Holy Spirit.²¹ They did not experience forgiveness of sins or full salvation. At best, they could take comfort in the promise of the new covenant and in certain cultic ceremonies which prefigured it.²² Similarly, Peter Rideman insists that God's Spirit was not given in Old Testament times. Consequently, life under that law was not one of sonship, but of servitude.²³ Without the Spirit, the law could only be "a yoke of bondage, doing naught but driving, commanding and demanding..." The most such a law can do is that "it showeth, pointeth out and maketh men conscious of sin; striketh, breaketh and terrifieth the conscience, that by so doing men might be moved to seek and ask for something better."²⁴

As long as the Mosaic law is regarded in this way--as having an almost exclusively prosecuting function and almost no pedagogical one--it will hardly be possible to speak, like Calvin, of the New Testament as clarifying and amplifying its value as a guide for life. This, then, is the "negative" reason why Anabaptists do not speak of this second use of the law. But we must not suppose that the Anabaptists, somewhat like Luther, were reticent in speaking of laws or norms to guide the Christian life. Quite the contrary! The "positive" reason for the absence of this second use of the law has to do with their emphasis on Christ's teachings. Jesus' words and way of life, which were regarded as strikingly different from the Old Testament law, became, in a sense, the "pedagogical" norm

of Anabaptist existence.

The Anabaptist understanding of Christ's law deeply influenced their attitude towards the public, or political function of law. The Schleicht-heim Confession agreed with John Calvin that in the Old Testament, or "In the law it is commanded that it should be done only in the name of God, truthfully and not falsely." However, the Confession continues, "Christ, who teaches the perfection of the law, forbids His followers all swearing, whether true nor false...."²⁵ And that settles the issue (even though the Confession continues to defend its teaching somewhat further against those who are not satisfied with this "simple commandment of God"). Similarly, Menno Simons asserts that Christ does not "point His disciples to the Law in regard to the matter of swearing--the dispensation of imperfectness which allowed swearing, but He points us now from the Law to yea and nay, as to the dispensation of perfectness...." Given this attitude, the Anabaptists could hardly regard all public laws as expressions of God's will for Christians. Rather, Menno goes on to insist that "before these words of Christ all human laws and policies concerning swearing must stand back and cease...."²⁶

However, since "law" in the public sense became neither a norm for action nor a theme for theological reflection, Anabaptist teachings on the subject are extremely difficult to discern. For the most part, one must infer them from general Anabaptist attitudes towards the State.

According to Anabaptism in general, God instituted governmental authority for two main reasons. The first was the punishment of evil doers. In this function, the State is an instrument of God's wrath. It is "a picture, sign and reminder of man's departure from God...."²⁷ Nevertheless, by placing some restraints on evil, the State has preserved society from total collapse. In this one can discern "the long-suffering of the Almighty, who desireth not that any should perish, but that all

should come to repentence."²⁸

The State's second function is to protect the good. This involves more than the mere restraint and punishment of evil doers. It includes caring for the poor, the widow and²⁹ the orphan and seeking the general benefit of all.

The State's second function is to protect the good. This involves more than the mere restraint and punishment of evil doers. It includes caring for the poor, the widow and²⁹ the orphan and seeking the general benefit of all.³⁰ It involves the maintenance of roads, waterways and the like. According to Menno Simons, government must even promote the true religion, and restrain false ones--insofar as this can be done "without tyranny and bloodshed...." Menno even appears to encourage rulers to become Christians; and to assure them that, if they do, "then shall your throne stand firm forever."³¹

Such a stance apparently conflicts with the more frequent Anabaptist insistence that a Christian could not become a ruler.³² Nevertheless, scattered instances of Anabaptists participating in government, or at least³³ acknowledging this possibility, have been found. When one remembers the savage opposition that Anabaptists experienced from the State, it appears natural that the possibility of Anabaptist participation in government would hardly occur to most. When it did, it was frequently rejected because of the assumption that any public official would have to "proceed with force."³⁴ Nevertheless, one cannot assume that, given a less conflictive situation, all Anabaptists would have shunned participation in all spheres of government. Anabaptists might have participated in limited ways in the formation and application of law in the public realm.

In examining the few scattered Anabaptist references to law-courts, one arrives at similar conclusions. Peter Rideman rejects the idea of

Christians going to civil courts or serving in them.³⁵ However, scattered instances³⁶ of carefully phrased opposing views can be found. The Wismar articles of 1554 proclaim: "as to demanding payment, at law, of just indebtedness, we approve in³⁷ all cases where no wickedness results therefrom."

Even if we make full allowance for these qualifications, however, Anabaptists were far from regarding civil law in general as a reflection of God's will. They were concerned with following, even unto death, the new way of life revealed in Christ. This way conflicted sharply with the general behavior and with many laws of their times. Had they participated in legal processes at all, one suspects that they would have exercised a very critical, transforming influence.

Summary

Despite our sometimes detailed historical explorations, our main purpose has not been historical. Primarily, we have been searching for certain "models" of the relationship between the roles of law in the personal, religious life and in public life. Let us summarize our findings, and their significance for the practice of law today.

Martin Luther proposes a paradoxical co-ordination of the personal and public functions of law. In personal, religious life, law is harmful and condemning; the Christian must live according to grace and the Spirit, not law and the letter. But public life operates according to law; the Christian must follow much the same statutes and legal practices as everyone else. In today's world, the personal and the public often seem even more distant than they did to Luther. For the modern person convinced of this sharp contrast, Luther suggests a way of being an intensely religious individual and yet of operating quite "normally" in the very different world of law.

John Calvin offers us much more continuity among the various functions of law. Though Christian life

begins through repentance and faith, and not through law and works, law soon becomes the norm for Christian living. And this same law, though often distorted and obscured, really lies behind the public laws of all societies. Christ did not add to it. He revealed it in greater depth. Consequently, the Christian, who has discerned this law's true character, might well work at purifying its expression and application in the public sphere. However, since God has instituted the present authorities, such activities should proceed in a way and at a pace which does not sharply challenge the government's practices and endanger society's stability.

Finally, the partial and sometimes conflicting testimony of the Anabaptist movement seems to present two possible models. If one carries their contrasts between the Old Testament law and the way of Christ, and between the way of government and the way of Christians, to the extreme, then a positive, constructive use of the term "law" hardly seems possible. At most, "law" might designate a pattern of Christ-like behavior. But this behavior would be followed by special groups which avoided constructive involvement in social processes. To be sure, such groups might work out innovative "legal" procedures--might devise ways of handling grievances, arbitrating disputes, etc.--among their members. But such procedures would not enter into direct dialogue with those of society.

If one remembers the exceptions to these hard-line Anabaptist pronouncements; and also considers what Anabaptists might have done in less conflictive times; then a second model emerges. It would also begin with the attempt to organize Christian life--personal as well as corporate--according to the way of Christ. But Christians interested in legal matters would then seek dialogue with public legal principles and processes, and work within this sphere insofar as possible. Perhaps the principles and practices of both groups would correspond at many points. If so, Christians would not discern

this by regarding public legal principles as normative, and then seeking some deeper, more explicit meaning in Christ. Instead, one would begin from Christ's vision of corporate existence, and then search for analogies and partial realizations in public law. One would also have to assume that the way of Christ might occasionally--and perhaps frequently--come into conflict with current legal norms and practices. At such points, Christians guided by an Anabaptist orientation would have to become very critical of, or refuse to participate in, certain legal activities. Perhaps they would find their opportunity to function in the recognized legal system sharply curtailed or even wholly denied.

FOOTNOTES

1. Roland Bainton, *The Age of the Reformation* (New York: Van Nostrand, 1956), pp. 94-97.

2. This is a major theme especially throughout *Luther's Commentary on Galatians*. See Jaroslav Pelikan, editor, *Luther's Works* (St. Louis: Concordia, 1963), Vols. 26 and 27.

3. See, for example, *Luther: Lectures on Romans* (Philadelphia: Westminster, 1961), pp. 66-72, 124-131.

4. Helmut Thielicke, *Theological Ethics* (Philadelphia: Fortress, 1966), Vol. I, pp. 298-320.

5. The notion of the "three-fold use of the law" derives not from Luther, but from the second edition of Melanchthon's *Loci Communes*, 1535. See Gerhard Ebeling, *Word & Faith* (Philadelphia: Fortress, 1963), pp. 62-69; cf. Thielicke, Vol. I, pp. 130-134.

6. Paul Althaus, *The Ethics of Martin Luther* (Philadelphia: Fortress, 1972), pp. 31-32.

7. Pelikan, ed., Vol. 24, p. 228.

8. Althaus, *op. cit.*, p. 29.

9. Althaus, *ibid.*, p. 31.

10. Pelikan, ed., Vol. 46, pp. 25-29.

11. Althaus, *op. cit.*, p. 46.

12. *Ibid.*, p. 58.

13. *Ibid.*, p. 46.

14. John Calvin, *Institutes of the Christian Religion* (Philadelphia: Westminster, 1960), pp. 354-355. All page numbers cited in reference to Calvin are from this work.

15. John H. Yoder, ed., *The Legacy of Michael Sattler* (Scottsdale, Pa.: Herald Press, 1973), p. 122.
16. John C. Wenger, ed., *The Complete Writings of Menno Simons* (Scottsdale, Pa.: Herald Press, 1956), p. 329.
17. Alvin Beachy, *The Concept of Grace in the Radical Reformation* (Nieuwkoop, The Netherlands: B. deGraaf, 1977), pp. 23, 70.
18. Wenger, ed., *op. cit.*, p. 329.
19. *Ibid.*, p. 337.
20. William Klassen, *Covenant and Community* (Grand Rapids: Eerdmans, 1968), p. 115.
21. *Ibid.*, p. 119.
22. *Ibid.*, pp. 115, 118.
23. Peter Rideman, *Confession of Faith* (Rifton, N.Y.: Plough, 1970), p. 64.
24. *Ibid.*, p. 65.
25. Yoder, ed., *op. cit.*, p. 41.
26. Wenger, ed., *op. cit.*, pp. 24-25.
27. Rideman, *op. cit.*, p. 104.
28. *Ibid.*, p. 207.
29. Beachy, *op. cit.*, pp. 160, 162.
30. Wenger, ed., *op. cit.*, p. 604.
31. *Ibid.*, p. 605.
32. See Beachy on Pilgram Marpeck, *op. cit.*, p. 159-161, 163; Rideman, *op. cit.*, p. 105-108.
33. Claus-Peter Clasen, *Anabaptism: A Social History* (Ithica, N. Y.: Cornell U., 1972), p. 179.
34. Beachy, *op. cit.*, p. 156.
35. Rideman, *op. cit.*, p. 112-114.
36. Clasen, *op. cit.*, pp. 174, 179.
37. Wenger, ed., *op. cit.*, p. 1042.

ON THE HISTORY OF LAW AND ITS INFLUENCE IN WESTERN SOCIETY

William J. Hawk

To comment on the history of law and its influence in Western Society is, to put it mildly, a Herculean project. To do so within the time and interest constraints of this conference is not Herculean, it is impossible. Therefore, I expect toleration in my choice to focus on a much smaller task. I have chosen to comment on the theory of legal history articulated by a renowned professor of law at Harvard University, Harold J. Berman. The framework for my comments is given by Berman's insightful article, "The Religious Foundations of Western Law."¹ My approach involves three steps. First, I will rehearse Berman's thesis concerning the crisis of law in the West. Second, I will raise some critical questions regarding Berman's position. Specifically, I will suggest ways in which an Anabaptist-Mennonite legal scholar might differ with Berman's assessments. And finally, I will make some general observations about the course of the development of the law in Western Society. These observations are intended to stimulate further thinking and discussion, not to end the debate.

I. Berman's Thesis on the Crisis of Western Law

"The Western legal tradition," writes Harold J. Berman, "is undergoing in the 20th century a crisis greater than any other in its history...social, economic, and political transformations of unprecedented magnitude have put a tremendous strain upon traditional legal institutions and legal values in virtually all countries of the West."

And at the same time,

The West itself has come to doubt the universal validity of its vision of law--its validity for non-Western cultures. What used to seem "natural" now seems only "Western," and often it seems obsolete even for the West (490).

The joint crisis of both confidence in and practice of "Western" ways of life is not a theme original to Berman. Crisis is a common feature of our intellectual landscape. Berman's uniqueness comes with his focus on the legal crisis and his tracing of the crisis to the religious foundations of the Western legal tradition. To adequately comprehend the current crisis in the Western legal tradition, it is necessary, argues Berman, to return to the roots of that tradition in the eleventh, twelfth, and thirteenth centuries.

Prior to the eleventh century the legal rules and procedures operative in Europe were "largely undifferentiated from social custom and from political and religious institutions generally" (491). Prevailing laws and legal institutions were not organized.

Very little of the law was in writing. There was no professional judiciary, no professional class of lawyers, no professional legal literature. Law was not consciously systematized (491).

Then at about 1100 A.D. some dramatic changes took place. The first modern law school was founded in Bologna, Italy. Second, the Justinian Code (ca. 534) was rediscovered and became the center of the juridical curriculum. The advent of a common legal curriculum and a center for corporate investigation generated both the conception of a legal science, a body of knowledge found in authoritative books, and a legal method, namely scholasticism.

This concurrence of events subsequently providing the foundation for the Western legal tradition

was no happenstance. It was motivated by the struggle for authoritative hegemony which raged between ecclesiastical and secular powers. Both supporters of the papacy and supporters of the emperor had searched the Code of Justinian in hope of supporting their respective claims to legal supremacy. For centuries church and secular authorities had co-existed with no fixed line of demarcation between them. Only in the ninth and tenth centuries had the struggle for power become acute. For example,

of the twenty-five popes who held office in the century prior to 1059 twelve were directly appointed by emperors and five were dismissed.... In 1067 William the Conqueror issued a decree asserting that the king has the power to determine whether or not a pope should be acknowledged by the Church in Normandy and England, that the king makes ecclesiastical law through Church synods convened by him, and that the king has a veto power over ecclesiastical penalties imposed on his barons and officials (496).

The papacy, however, did not take these usurptions of its authority quietly,

In 1075...Pope Gregory VII,...proclaimed the legal supremacy of the pope over all Christians and the legal supremacy of the Church, under the pope, over all secular rulers (496).

Gregory claimed that popes could depose emperors. This counter-challenge brought the crisis of legitimacy to a head. Following a civil war which raged through Europe for forty-five years a compromise was reached which granted separate but equal jurisdictions--the papacy over spiritual matters, the civil authorities over secular matters.

It was in the midst of this controversy that both canon and civil law were organized, codified and

expanded. The motivation for both secular and religious authorities was to insure their respective claims to legitimate jurisdiction.

Given this interrelationship between religious and civil authorities, one that was by no means always friendly, but always counterbalancing, Berman asserts: "The primary cause of the crisis of the Western legal tradition is the disintegration of its religious foundation" (500). What Berman means by "religious foundation" is not canon law or church structure or religious attitudes, but is, instead, "the integration of law with religion, of order and justice with faith and morals, in an integrated community which transcended both" (500). The real source of the crisis stems from the erosion of the social structure which typified medieval life. According to Berman, the communitarian social structure had a profound impact upon the way the law was framed and how it functioned in society:

Because life was much less compartmentalized than it later became much more a matter of total involvement, poetic and symbolic speech, which is closely associated with the whole being and with the unconscious, was more appropriate than prosaic and literal language, especially on solemn occasions involving the law (503).

Law like art and myth and religion, and like language itself, was for the peoples of Europe in the early stages of their history, not primarily a matter of making and applying rules in order to determine guilt and fix judgment, not an instrument of the separation of people from each other on the basis of a set of principles, but rather a matter of holding people together, a matter of reconciliation (503).

Christianity invaded the predominantly static communal life of this period and brought with it a message of a community of believers which transcends

kindred, tribe, and territory. It offered freedom from fate, freedom from death and a positive meaning to life. Received with openness by these Germanic peoples, Christianity became fully integrated into their social life. Its primary impact was to bind the social fabric across tribal lines and to mitigate some harsh practices characteristic of medieval life, such as, slavery and blood feuds.

Berman concludes his article with a restatement of his main thesis: "The crisis of the Western legal tradition is primarily due, to the breakdown of the communities on which the Western legal tradition is founded" (507). He means those Christianity infused, socially cemented communities where life was not fragmented and society was not overly individualistic. In contrast to this coherent social matrix we see in modern Western Civilization that,

Religion is irrelevant to the law schools, and law is alien to the religious mind. Law becomes just a mechanism, religion just an escape. This is the end of the 900-year-old era of Western law; dualism, or rather pluralism, becomes simply fragmentation and disunity (507).

The fact is that the Western legal tradition is not able to resolve satisfactorily most of the individual and social conflicts which have confronted it in the 20th century, and is not able to maintain order and justice either within the nations that uphold it or in their relations with each other or in the world as a whole. And that is its crisis (500).

We may want to take issue with this assessment. That the Western legal tradition has not satisfactorily resolved most of the individual and social conflicts which it has handled in the 20th century is not an undisputable truth. I can imagine that

there are many practicing attorneys, judges, and legislators who would demur.

But there are other features of Berman's thesis which should attract our critical attention. As Anabaptist Mennonites we have been wont to speak with something short of adulation regarding the Constantinian Christendom which Berman seems to hold up as a model. A powerful reason why the social matrix was closely stitched and why law was able to deal with conflicts which arose in a reconciliatory manner was that Christianity did not concern itself with social reform. Berman states approvingly,

(Christianity) was hardly concerned with the reform of social institutions. It was above all concerned with the life of the world to come, and with preparation for that life through prayer and through personal humility and obedience. (504)

Further on he comments,

The Church as an organization did not stand opposite the political order but within it. Religion was united with politics and economics and law, as they were united with each other. The Church taught sanctity and produced saints,...(505),

If an effective legal system can be bought only at the price of a conformist Christianity fully integrated into the secular world, perhaps we should be less concerned when the legal system faces crisis. In fact, though I have not worked out the argument in detail, perhaps this lesson teaches us that a goal of Christianity is to keep the legal system in a state of crisis. I will leave this for your consideration.

The third criticism that I level against Berman is the most serious. He has painted a fine picture of the origins of the Western legal tradition emphasizing the Church's role in the development of a legal system and Christianity's role in the effective

functioning of that legal system. He then jumps several centuries to the present where he leaves the impression of an ominous crisis about to overcome the entire legal system. But nowhere does he drop a clue as to what went wrong between then and now. This silence is more disturbing when we consider the possibility that the foundations of the Western legal tradition contained the germs of its own destruction.

The three facets which draw Berman's attention--the separation of civil and ecclesiastical authority, the introduction of systems of law through codification and organization, and the introduction of Christianity--may all be seen as contributing to the dissolution of the community matrix which made that system of law possible. The separation of civil and ecclesiastical law placed two competing and supposedly equal systems of jurisdiction in a position of vying with the household and tribe for unconditional allegiance. As the civil authorities co-opted warriors and emissaries and the Church drew persons to isolated institutions of piety, the grip of the household and tribe on persons was loosened. Furthermore, the existence of working legal systems provided attractive alternatives to tribal and familial customs when it came to the resolution of conflicts and remedies for injuries. It is not a happenstance that as legal systems, both civil and ecclesiastical, grew, the importance of the tribe and the family waned. Finally, the message of Christianity itself--"that all believers form a community, a Church, which transcends kindred, tribe and territory"--must be faulted for the breakdown of the medieval community social structure and the subsequent formation of a society of isolated and autonomous individuals with only voluntary contractual relations with each other. The Reformers were merely the logical outcome of taking the message of transcending kindred, tribe and territory seriously. We as Anabaptist Mennonites might wish that they had taken the formation of the new community just as seriously.

In conclusion, Berman in failing to account for how it is that we have come from the origins of the legal tradition to the present crisis misses the critical point that at its very inception the Western legal tradition carried the germs of its own dissolution. Absent the creation of a new social order transcending the traditional parochial enclaves of human life, we should be surprised to find legal traditions in any condition other than one of crisis.

III. Major Tendencies in the History of Western Legal Theory and Positive Law.

1. In the course of the development of legal theory there has been steady movement away from viewing law as a rational system (based upon reason) toward viewing it as an intentional system (based on will expressed in commands or rules).

Justice is one, it binds all human society, and is based on one law, which is right reason applied to command and prohibition.

---Cicero *De Legibus*

Laws are ordinances of reason promulgated for the common good. ---Aquinas

Law is nothing else than the command of the sovereign in his exercise of sovereign power.

---Jean Bodin

Law is a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. ---John Austin

2. Legal Theory has advanced by discarding a theological foundation and establishing law as an autonomous human creation.

Man is a social, altruistic and rational being. Therein lies the origin of law, which would be binding whether or not God exists.

---Hugo Grotius

3. Throughout most of legal history law was taken to be intrinsically connected to morality but the trend is to see the connection between law and morality as merely historical and logically accidental.

In so far as one can show that a precept is not ordered to the common good one has shown that it is not a part of law. --Aquinas

The existence of law is one thing; its merit or demerit another. --John Austin

4. There has been a marked change of emphasis from concern for the substantive content of law to attention to strictly formal considerations of legal pedigree.

Legal norms may have any kind of content. --Hans Kelsen

5. The cognitive processes required for the legal enterprise are no longer primarily rational judgement and enlightened discernment but are quasi-technical in nature requiring the ability to apply general rules to specific cases.

...correct legal decisions are uniquely determined by pre-existing legal rules and the courts should reach their decisions solely by logical deduction from a conjunction of a statement of the relevant legal rules and a statement of the facts of the case.

--Montesquieu

6. The study of the institutions of law has moved from a dominant concern for normative assessment to one of descriptive accuracy.

The law is the sum of the rules of constraint which obtain in a state. --Rudolf von Jhering

The law is the prophecies of what the courts will do in fact. --Oliver Wendell Holmes, Jr.

7. University training in law has increasingly emphasized the practice of the law to the neglect of the theory of law. Law schools self-consciously

perceive themselves to be producing legal practitioners and not legal scholars.

8. People in Western Civilization increasingly rely upon the law to resolve problems formerly perceived to be religious, familial, or personal.

With these observations and my former suggestion that there may be an element of hope in the crisis faced by the Western legal tradition, I leave to further discussion the question of how Anabaptist Mennonites in the United States in the twentieth century should approach legal institutions and the law.

FOOTNOTE

1. Harold J. Berman, "The Religious Foundations of Western Law," *Catholic University Law Review* 24:3 (Spring, 1975), pp. 490-508. See also Harold J. Berman, "The Influence of Christianity Upon the Development of Law," *Oklahoma Law Review* 12 (1959), pp. 86-101. Page numbers to the first article are given in the body of the text in parentheses.

LAW AND MORALITY Tensions and Perspectives

Conrad G. Brunk

I. The Concepts of Law and Morality

The question of the relationship between law and morality is one of the fundamental questions in jurisprudence. It goes straight to the heart of the nature of law itself. Law and morality have many obvious features in common. Both have as their basic function the guidance of human behaviour and the shaping of human social institutions. Both claim to be instruments of a fundamental norm called "justice." Both impose obligations and duties and both confer rights and powers.

In primitive societies there is usually no distinction at all made between legal obligation and moral obligation. All obligation in these societies is seen as the expression of the will of a god. It is formulated by religious leaders and "enforced" by them.¹ The idea that an individual's moral obligations could somehow stand in opposition to his legal duties could not occur in such a society. Legal and moral duties are one and the same; not even a conceptual distinction can be made between them. This, says Jacques Ellul, is the understanding of law that characterizes the Old Testament and indeed the whole of Scripture. There is no standard except God's righteousness and justice--which is called "law."² It is both established and revealed in God's covenant. There is in this stage of law and morality only one standard of justice and righteousness--only one source of individual and corporate responsibility--the will of God Himself.

It is common in the development of these societies, however, that they generate juridical institutions distinct from the purely religious institutions that represent divine will. Laws begin to be codified and enforced, not because they are thought to be divine decrees, but because they have emerged in the customs and practices of the society and because they facilitate the social and economic goals of that society or certain segments of the society. Laws at this stage become recognized as the product of a *state*, or at least of *rulers* who may or may not also claim divine right to formulate and enforce laws.

It is at this second stage that a distinction emerges between law--the expression of secular authority--and morality--the norms of a deity, of reason, or of "natural law." Only at this stage does the possibility arise that the norms of morality or conscience might run counter to the requirements of law. The question of how one in this dilemma ought to act has been the subject of philosophy and literature from the earliest times. The conflict of obligation felt by Socrates before the Athenian tribunal in Plato's *Apology* is as fully articulated as modern discussions of civil disobedience and conscientious refusal to obey the law.

The emerging distinction between legal and moral obligation in most societies goes beyond the mere distinction between their sources. Other differences are commonly noted. Law, it is often claimed, depends upon its ability, through the threat of coercive sanctions, to provide external motivation for behaviour. That is to say, part of the validity and effectiveness of law depends upon its power to *coerce*. Morality, on the other hand, does not need any such external sanction in order to be either valid or effective. Moral injunctions are valid if they comport with divine will, reason, or natural law, as the case may be, and their effectiveness depends upon the *internal* motivation of moral conscience. The moral person needs no external sanction to guide his or her behaviour.

Other differences are commonly pointed out. Laws can be legislated into existence, amended, and repealed. But it makes little sense to think of "passing" or repealing a moral principle.³ Persons can fully discharge their legal obligations merely by conforming their external behaviour to the requirements of the legal rules, but to be moral is more than external conformance to moral rules. To be a moral person in the most complete sense is to do the right thing with the right motive as well. Closely related to this distinction between law and morality is the fact that to be held *morally responsible* for an action, one must have intentionally offended against the moral rules. While more developed legal systems also contain this same feature (in the legal doctrine of *mens rea*--the requirement in criminal law that the offence be done with a "guilty mind") it is not necessary that they do so. Legal systems often contain "strict liability" for the breach of legal rules, which permits liability for one's action even where it was totally unintentional or even unavoidable. But "strict liability" makes little sense in morality.⁴

Nevertheless, despite the emergence of the distinction between law and morality in the evolution of society, with a recognition of the mundane origins of law there was usually an attempt to hold the two closely together. Hence, as Jacques Ellul points out, the next step usually involves the elaboration of secular law into a theory of natural law.⁵ This step includes the attempt to place law and legal obligation upon a moral foundation, to see valid law as the expression of moral norms founded in nature or reason. Secular law then becomes an expression of the natural or morally right order of things. Insofar as a legal system, or even a specific law, conforms to this order, there is an obligation to obey it. But insofar as it contravenes this order its legal validity and the duty to obey it are called into question. On the natural law formulation, while law and morality are not identical, there is a necessary connection between

them. Legal obligation is not the same thing as moral obligation, but gains its validity from the moral order. In the classical formulation of this doctrine in Roman law and Christian philosophy from Augustine through Aquinas to the Enlightenment, any law that violated natural justice was not valid law at all. In Augustine's view the so-called "law" of a tyrant was no more valid as law than are the coercive threats issued by a gang of robbers.⁶ Aquinas held that, "A human law...at variance in any particular with the Natural Law, is no longer legal, but rather a corruption of law."⁷ Hence, such a law does not, in his view, "oblige in conscience"--there is no duty to obey it.

Natural law is not the only alternative in the advancement beyond primitive law, however. Once the primitive identification of law with morality is broken down in the way we have described, a jurisprudence radically different from "natural law" often emerges. This jurisprudence leads to the complete severance of law from all moral foundations. Instead, it finds the source of law and legal validity solely in the empirical reality of political power and will. Laws on this account are nothing more than commands issued by some person, or group of persons, who have the actual power to back them up with the threat of sanctions. This view, commonly known today as "legal positivism," is as old as the Greek Sophists. It received its most systematic expression in Western jurisprudence in the political theory of Hobbes, and later in the writings of the nineteenth-century jurists, Jeremy Bentham and John Austin.

Legal positivism, which remains the prevailing concept of law in the twentieth century, cuts law off from moral norms altogether, as well as from any divine or transcendent authority. Law is valid *qua* law as long as it successfully carries out the will of the sovereign who issues it, by exacting the obedience of the subjects whom it commands. Whereas the natural law view held that the injustice of a law or system of law called into question its validity as

law, legal positivism holds that the justice or injustice of law is irrelevant to the question of whether it *is* law. Hence the question of one's *legal* obligation is quite distinct from the question of one's *moral* obligation. A law or legal system might be quite unjust or immoral, yet still might create a legal obligation to obey. Legal positivism in its most radical form sees civil law as primarily an instrument of force and political power rather than of morality. John Austin wrote, for example, in his famous *Province of Jurisprudence Determined*, "An exception, demurrer, or plea, founded on the law of God was never heard in a Court of Justice, from the creation of the world down to the present moment."⁸ Anyone who complains in a court of law that the law enjoined against him is unjust or contrary to the law of God, said Austin, will find that "the Court of Justice will demonstrate the inconclusiveness of [his] reasoning by hanging [him] up, in pursuance⁹ of the law of which [he] has impugned the validity." Less radical legal positivists, like H. L. A. Hart, agree that law *need* not conform to the demands of morality in order to function as law, but that it often does in fact reflect and embody¹⁰ the moral norms of the society in which it functions.

Nearly all debates concerning the existing or proper relationships between law and morality rest upon the assumptions at issue in the natural law/legal positivism debate. For example, the question of whether law ought to be used, or can be used, to enforce morality in society will be answered differently, depending upon how intrinsic to law one views morality in the first place. Similarly, the issue of the legitimacy of civil disobedience or conscientious refusal to obey the law is shaped in large measure by the view taken of the nature of legal obligation in the first place. Natural lawyers and legal positivists will give very different answers to the question, "What is the nature of the moral obligation to obey law?" This does not mean that natural lawyers will always end up together on one side of the civil disobedience debate and legal positivists on the other,

but only that the manner in which they defend their conclusions will differ importantly. For the former, the introduction of moral argument into the legal processes of adjudication, advocacy, and defense is natural and desirable since law is viewed as intrinsically moral in its function and content. For the latter, moral critique of law is extrinsic or incidental to the work of law, because it has no *inherent* moral function.

The debate between legal positivists and natural lawyers has continued to the present day. The primary points at issue in the debate could be summarized as follows. First, the natural law view of law holds that the phenomenon of law in society cannot be explained without reference to certain moral norms, especially a norm of justice. Hence, at a minimum, law must express or conform to certain standards of morality in order to function as law, as opposed to more arbitrary and capricious imposition of one will upon another. The natural law view of law need not hold that the moral norms implicit in law be objectively grounded in nature or absolute reason, though it often does hold such a view, as the name "natural law" itself implies. It need hold only that law must comport with certain norms of justice or morality that are *in fact* held by those who govern and are governed by it, whether these norms are founded in nature, reason, or mere conscience or custom. *Natural law jurisprudence need not rest upon a natural law ethic.*

Legal positivism, on the other hand, denies this tenet of natural law jurisprudence, holding that the existence or validity of law is totally independent of any moral foundation. "The existence of law is one thing; its merit or demerit is another,"¹² said John Austin. Law has to do with the issuance of commands or rules by someone with power to elicit obedience, whether or not they conform to standards of justice or morality. Positivism denies any essential connection between law and morality. In its extreme form it denies that the iniquity of a law or legal

system has any relevance to the question of whether it is valid law. If it succeeds it is law, and it obligates legally, regardless of its justice or injustice.

Second, natural law and legal positivism differ in their views of the nature of legal obligation. The natural law view holds that to be legally obligated is to be in some sense morally obligated as well. This stands to reason since law performs the essentially *moral* function in society of maintaining justice, establishing conditions for moral relationships and interaction among persons, promoting social welfare, etc. Hence the obligation to obey the law stems not only from the sanctions and power that lie behind the law, but also from the moral objectives realized by the law. To the extent that the aims of law are just and good, to this extent the obligation to obey is moral--it "binds in conscience" as the scholastics liked to put it. Purported laws that do not achieve aims admitted as just or good by those among whom they function must fall back increasingly upon the threat of sanction to elicit obedience. But to the extent that they must do so, to this extent also they fail to obligate at all. To this extent they cease to function as valid law and turn purely and simply into brute force.

In the natural law view there is a vast difference between being *obligated* to do something and merely being *obliged* to do it by coercive threats--between being obligated by law and being coerced against one's will by the gunman. The difference has to do with a level of moral acceptance present in the former that is totally absent in the latter. This is a critical aspect of the natural law view--that law functions most fully as law only when it is perceived by those whose behaviour it regulates as *morally obligating* them rather than merely coercing or *obliging* them. A system of law that has no moral consensus behind it will resort to increasingly high levels of brute force and violence--as evidenced by increased severity of sanctions, increased police

enforcement and the expansion of police powers. But in the process it will undermine rather than enhance its ability to order social life and promote just ends.

For the legal positivist, on the other hand, the obligation to obey law is totally independent of any sense of moral obligation on the part of those whom it governs. Legal positivists differ in their accounts of this independent source of legal obligation, but concur in the view that it need not be a moral source. Hence, positivists agree that the question of whether a law or system of law is legally valid and imposes a legal obligation to obey is completely independent of the question of whether it morally ought to be obeyed. It is perfectly consistent, as H. L. A. Hart says, to say of a law, "This is law; but it is too iniquitous to be applied or obeyed."¹³

This point of difference between the two concepts of law leads naturally to a third important difference. Since the legal positivist denies the moral foundation of law and legal obligation, the central defining characteristic of law is its efficacy in carrying out the will of a sovereign (e.g., the monarch, the party, the legislature, etc.). In the positivist view the source of law is *will* and the coercive power which backs up that will. The validity of law is cut off entirely from its moral content¹⁴ or its aims and is derived solely from the power to enforce held by the originating agent--the will of the sovereign. The defining characteristic of law becomes coercive power.

Natural law jurisprudence radically rejects this notion. While law, unlike morality, often includes coercive sanctions as part of its ordering function, this is not its defining characteristic. Law is not essentially coercive will imposing itself upon a cowed populace but is the product of shared aims, values and principles of conduct among people. Its power as a social ordering force lies in the moral

consensus that underlies it. Hence reason (natural law, natural rights, rational mind) or conscience (moral sense, common values) is the ultimate source of law, not the will to power.

The central issue in this debate is whether law is primarily an imposition of force and coercion, or the concrete expression of an underlying moral consensus. Is it an order imposed by one will upon another, or is it an external embodiment of the internalized morality of a community or of norms written in nature or reason? This, despite appearances, is not just a question of the definition of law. It is a question of how law actually functions in society and how it relates to the morality, or lack of morality, in the society.

If it is the case that there is some vital link between law and morals, this has significant implications for how we view the role of law in human affairs. Does law perform an important *moral* function in human society and institutions (including the church)? If law is a reflection of morality, might it not also be a means of promoting, maintaining, even *establishing* certain moral norms? Might it not also be true that certain kinds of moral relations--of justice and equity, for example--are impossible to attain without the imposition of law? And even more importantly, is it possible to establish and maintain a system of law in the absence of a popular moral consensus--a shared commitment to certain fundamental ethical, or even religious, assumptions? Or is law precisely that human institution that can succeed in holding together a morally and religiously pluralistic society just because its power derives from a non-moral source? The crisis of "law and order" in contemporary Western society suggests that a legal system cut loose from its moral foundations cannot succeed in maintaining a tolerable, to say nothing of a *just* social order. More on this later.

The emergence of modern legal positivism, like the modern view of the democratic state, has deep rootage in the Protestant Reformation. The Lutheran side of the Reformation was especially influential in this respect. Luther radically rejected natural law ethics as well as the natural law jurisprudence of scholastic Christianity. He replaced scholastic rationalism with a radical voluntarism--the view that God's active will, not God's mind or reason, was the source of all truth, right, and good. Law, whether divine or mundane, was the expression of will and power--either the omnipotence of God or the monopolistic power of the earthly sovereign.

In addition, Luther's well-known doctrine of the "Two Kingdoms" drove a deep wedge between the realm of law, which governed in the "earthly kingdom" or society, and the realm of love and grace, which held sway in the "spiritual kingdom," or the individual lives of Christians. According to Luther, law, both moral and civil, had been superseded by the grace and mercy of God in the death of Christ, freeing individual Christians to live by a higher principle in their individual dealings with others--the principle of love. The moral law was the expression of God's sovereign will in revealing to all their sin and their need for grace and forgiveness which also liberated them to live not by the law but by love. The law of the state was, similarly, an expression of the will and power of the magistrate. But this civil law was necessarily only for the ordering of affairs in the "earthly kingdom" or the secular affairs of humankind. It was not the ultimate standard of behavior for individual Christians in their relationship with each other. For Luther, the life of Christians is divided between both kingdoms because they participate in both. As a member of the civil society one must live by and use the instrument of law, but as a member of the community of faith one's life and behaviour transcends the law and exhibits the higher reality of Christian love. This

dual aspect of existence applies to magistrate as well as the mere citizen.

Hence in Luther's doctrine of the "Two Kingdoms" one finds the seeds of the modern legal positivism and the associated concept of the secular state, only articulated fully a century later by Hobbes. For Luther, civil law is cut loose both from the highest norms of Christian behaviour--love and grace--and from the divine law. Law becomes essentially the expression of the will of the sovereign magistrate, whose role, to be sure, is established or ordained by God. But Luther rejected a theocratic view of the state in which the law was viewed as the direct expression of God's will for the community because there was yet a higher principle by which Christians could live. Luther's view of civil law graphically illustrates the fact that when a voluntaristic conception of law is cut loose from its theological foundation (i.e., the divine will) it becomes a form of legal positivism. Law becomes merely the command of a sovereign backed up by the power to enforce sanctions. Law becomes the product of the state, rather than the other way around. This aspect of Luther's thought helps to explain the antagonism which he saw between the "Two Kingdoms." If the realm of law is essentially the realm of force, coercion and primitive sanctions, it necessarily stands in opposition to the concept of nonresistant, forgiving love. Luther saw clearly the movement of Jesus and the New Testament toward the latter norm, but saw equally clearly the need for law as an ordering force in sinful society. It is, I think, for similar reasons that Luther could not bring together the concepts of divine law and divine grace, since the former too was an expression of sovereign power somehow incompatible with the infinite mercy of divine love.

The Anabaptist understanding of law and the state must be viewed in this Protestant, Lutheran context. For the most part, the Anabaptists accepted the Lutheran "two kingdoms" doctrine in its entirety, and with it the implicit view of civil law as the

coercive command of the sovereign state. With Luther they rejected the Catholic understanding of law as the expression of a moral order, either divine or natural, to which the magistrate was subordinate. Law was not the source of magisterial authority; rather magisterial power was the source of law, and hence of justice itself. No concept of social justice rooted in Scripture or divine law, to say nothing of nature itself, is present in (most) Anabaptist thought, just as it eludes Lutheran theology.

There is a subtle, but highly significant distinction to be made here. Both Luther and the Anabaptists accepted the Pauline idea that governments are ordained by God to carry out a unique function of maintaining social order, and to do so justly. What they both rejected in the scholastic, natural law tradition, however, was the idea that *the law itself* was in any way an extension of God's will or any natural moral order. Law was viewed as the necessary instrument by which government exercised its authority. But law *qua* law was a coercive instrument that could be used for good or ill, to protect the innocent or to oppress them, to do justice or injustice. Most importantly, the Anabaptists agreed with Luther that law, as coercive force, was neither a necessary nor a legitimate part of moral ordering within the Christian church itself. Christians, it was held, did not need the coercive sanctions of law to direct their relations with each other. The bonds of Christian love, trust and mutual concern were sufficient.

The only significant point where the Anabaptists departed from the Lutheran view was on the question of the Christian's relationship to the secular order and, hence, to the legal structures of the state. Whereas Luther viewed the Christian as being necessarily a part of both the secular order governed by law, and the divine order governed by love and grace, the Anabaptists generally held that the true disciple of Christ ought not to participate in the coercive order of the state at all--that is, that all of life

must be governed by the principle of love. From this premise the Anabaptists were driven to reject the legal order altogether as an instrument to be used by Christians in their relations to others.

Pilgram Marpeck gives clear expression to this view when he writes,

The wisdom of the office of the worldly rulers is designed to work through the external sword in vindictiveness, mercilessness, hate of sin, physical vengeance, killing of evildoers, worldly natural governments, judgments and similar things... Christ's wisdom is merciful and will not serve him in his office because he is not merciful in his office but rather an avenger ...The kingdom of Christ is not of this world. For this reason no true Christian may administer cities and protect countries, nor people as an earthly lord. Nor may he use force, for that is the function of earthly and temporal rulers but never of true Christians under the cover of the faith in Christ.¹⁵

Note the implication of the statement that the institution of civil law is *intrinsically* coercive, forceful, and hence outside of the moral order of love and grace established by Christ. It is not coincidental that the law and all functions of state are referred to by the Anabaptists (as by Luther) as "the sword," as if the violent force of the sword were the essential defining characteristic of law itself (the legal positivist view). "The sword" refers not just to the police or military functions of the state but to the whole concept of rule by law.

Consequently, the rejection of the "sword" as an instrument of human order meant for the Anabaptists, as for most of their Mennonite descendants, the official renunciation of not only warfare, but also the use of the courts and litigation for the settlement of disputes, the offices of legislator, police,

governor, and all but the very lowest levels of public office, and for some even the role of voter in civic elections. Of course, in practice this renunciation of law in all its forms has never been absolute, even among the most radically separationist of the Anabaptist-Mennonite groups.

Nor *could* this renunciation of law be absolute. Despite all the Anabaptist-Mennonite attempts to relegate law to that worldly order "outside the perfection of Christ," in practice various elements of law have necessarily been part of their life. Herein lies, I believe, one of the most significant weaknesses in the Anabaptist-Mennonite view of law. But accepting the Lutheran legal positivist account of law as essentially a coercive command of the sovereign state, the Anabaptists drew the logical conclusion that all of law is essentially in the same mode as criminal law. That is to say, the paradigm case of law is the prohibition of certain behaviour, made effective by the attachment of threats to sanction for disobedience. Laws creating legal powers (e.g., the power to own land or to act as guardian or executor) establishing institutions and contracts (e.g., marriage, corporations), or allocating liabilities (e.g., the law of torts, insurance laws), were derivative from this basic paradigm. These, too, were little more than extensions of the coercive arm of the sovereign state. They were not seen, as in the natural law view, as the necessary means of *establishing* important moral relations among persons in a community.

Nevertheless, these latter kinds of legal entities have always been a vital part of Anabaptist-Mennonite life. Economic activity is hardly possible without reliance upon legally defined institutions. The legal definitions of property, valid contract, etc., are fundamental to any economic activity whatever (even Hutterites must have legal title to property before they can farm it, unless they care nothing about using someone else's property). Legal arrangements of all kinds (contracts, wills, titles,

institutions) are an essential aspect of all social order and moral relations among persons, including Mennonites.

It might be argued here that these kinds of (non-criminal) social rules were often established within Anabaptist societies apart from any recognition or enforcement by a government or police, and hence, that this shows the possibility of establishing these moral relations among persons in community *without* the coercive force of the state. This is indeed true. Mennonite settlements in closed communities in Russia, Paraguay, and Canada often developed their own form of "law." But this illustrates perfectly the fundamental flaw in the traditional Lutheran-Anabaptist concept of law. For it shows that law is not necessarily the product of a sovereign magistrate or state who has the monopoly on the use of force, but rather rises out of, and depends upon, the moral consensus of a community. Mennonite history itself belies the Anabaptist view of law as essentially *state law*. Whenever Mennonites isolated themselves from the laws of worldly governments, they immediately found it necessary to establish their own law. The Lutheran dichotomy of the community of law over against the community of love and grace is a false dichotomy. A community of love and grace must also necessarily be a community of law. The truly anarchistic society would be a society where sheer violence and brutality replaces all moral relationship. Aleksandr Solzhenitsyn's *Gulag Archipelago* is a picture of a society in which the moralizing constraint of law has been replaced with the sheer arbitrary and capricious rule of force. The truth of natural law jurisprudence is its insistence that force and coercion are in some respects the *opposite* of law, not its essence.

If, then, it is necessary to drive a wedge between the concept of law and the concept of the state, as natural law jurisprudence does, this allows the total recasting of the Anabaptist-Mennonite understanding of church and its relationship to the state and to

law. The most significant implication is that the question of how the church relates to law is not identical to the question of how it relates, or *should* relate, to the *state*. Anabaptist-Mennonite thought has almost always conflated these two questions into one, because of its underlying positivist assumption that law is nothing but the creation of a coercive state. If, however, law is something more than this, if it is in part, at least, the necessary product of a moral community (i.e., a community of persons who order themselves according to some understanding of justice and morality), then several important conclusions follow.

First, it becomes possible to see that not everything that states and governments do, even in the name of law or by means of the characteristic institutions of law (legislatures, courts, police, etc.) is thereby necessarily law and legally binding. Those "laws" that seriously violate fundamental notions of justice and decency in a community are not the same sort of thing as laws that consistently express these notions. The arbitrary fiats of tyrants like Hitler, Stalin, and other military dictators are all too characteristic of states, but they are not law in the same sense as the laws which reflect the ideals and values of the community in which they function. Obedience to laws of the latter kind is, for responsible members of a community, a natural expression of their own commitment to justice and the well-being of the community. Obedience to "laws" of the former kind is from motivations of fear and self-preservation. They destroy rather than build moral community.

Mennonite failure to appreciate this distinction lies at the heart of Calvinist Richard Mouw's observation that Mennonite writing and behaviour suggest that the only reason they obey the laws is that God commanded them to obey the government (Romans 13). He would prefer to think that Christians pay their taxes, observe traffic laws, pay their debts, etc., because they are concerned about the well-being of

their neighbors and the general morality of the community! The difference between these two attitudes is important. The object of obedience in the former case is the coercive state--obeyed because of the completely *external* divine decree. The object in the latter is the loving concern for one's neighbor, which the law facilitates. Mouw apparently feels, when his legal rights are respected by Mennonites, like a spouse whose Christian mate is faithful (only) because God commands faithfulness, rather than out of a loving concern.

Second, the distinction between law and the state implies a further distinction between law as an instrument of moral order and the *enforcement* of law, which is the coercive function of the state. Jacques Ellul has put this well:

Enforcement by the state should not be confounded with the authority of law, as is so often the case, particularly in our day. If law has authority over men, it is not because the state protects law by the sword. The authority of law is derived from its dependency on divine law, which makes law accepted as law by men. The sword punishes the transgression of what men acknowledge to be law...It cannot bring about law from what was not law before or vest with authority that which had none. The sword has no other function than "to execute wrath on the wrongdoer" (Romans 13:4).¹⁶

If the authority of law is not reduced to the function of enforcement, as positivism would have it, then the Anabaptist-Mennonite rejection of the coercive force and violence intrinsic to legal enforcement need not also entail rejection of all legal remedies. It also makes possible the acceptance of and involvement in certain legal functions and the renunciation of certain others (e.g., enforcement against law-breakers).

Mennonites have tended to view all of law as did the American positivist jurisprudent and Supreme Court

Justice, Oliver Wendell Holmes, Jr., who remarked that law must be viewed "from the bad man's point of view." Holmes believed that we see the essence of law only when it is enforced against the offender. But, as legions of Holmes' critics have pointed out, this view of law fails to account for the way law functions in the life of the vast majority of people most of the time in a stable, law-abiding society. Enforcement comes into play only on the occasions where the law has failed, not where it is succeeding! Enforcement is a necessary part of a legal system, and this is one of the elements of law that distinguishes it from morality. But enforcement is not the whole, nor even the most important element of law, as Holmes would have it.

Third, the distinction between law and state means that Christians can, and indeed *must*, recognize the necessity of law in any moral community, including the community of believers (the church). Even a community of love needs to confer powers, rights, and responsibilities, create "legal" entities, and create an orderly system of mutual expectations among people. This includes the instituting as well of motivators for compliance with the laws, or sanctions. The "ban" itself, which Anabaptists saw as the substitute for legal punishment, was an ultimate sanction, and a *coercive* sanction. So are fines imposed for returning the church library book late, to say nothing of the intricate network of rewards and punishments that hold together Mennonite family structures.

Fourth, the distinction between state and law means that the traditional Anabaptist insistence upon the separation of church and state need not entail a total separation of church and law. Nor need the church's acceptance and use of law entail the blurring together of the distinct functions of the church and the state. The state, even though it is not the source of law, is the proper custodian of law, not the church. The proper role of the state is to promulgate law, interpret it, and enforce it in a society where the full commitment to the radical discipline of Christ's

love cannot be assumed on the part of all citizens. Only in the church could "law" (e.g., rules governing church structure and decision-making) attempt to reflect this higher standard. But the fact that the law of secular society--the law of the state--cannot reflect the full requirements of Christian love is no reason for Christian people to have any dimmer a view of its vital moral function in the society in which they also live.

The Anabaptists were right in their view that the church ought not to usurp the state's role as guardian of law and justice. They correctly saw the fallacy of the Constantinian attempt to make the church the keeper of public morality as well as faith. The faith and commitment of those who follow Christ and join his church is not something that either the state or the law can rightfully demand. The reason, however, is not that society cannot be Christian, but that when it is not Christian, it cannot be made so by law or any other coercive force of state. Coming to faith and full discipleship, the Anabaptists clearly saw, must be voluntary to be authentic. What they did not see so clearly was the possibility of affirming the role of law, even utilizing the law to pursue justice and righteousness in the secular society without also putting the church into the role of the coercive state. The proper role of the church is to proclaim the Gospel of Christ to the world, and this includes proclaiming the message of God's justice as it can be embodied in law, and calling the state to be truly lawful. This the church can do without putting itself in the place of the state or any of its political functions (e.g., "Christian" political parties).

Fifth, the distinction between the state and law permits the desacrilizing of both the state and the political status quo. The grave danger implicit in the Lutheran positivist conception of law is that in making the state the source of law it elevates the state to virtually absolute status in the secular order. When legal positivism is combined with a

Christian doctrine of the divinely ordered sovereign it produces the absolute state whose every command is to be obeyed. The fact of Lutheran capitulation to Nazi rule in Germany is not out of keeping with a Lutheran theology that provides little ground for the legal critique of the state or valid dissent to its pronouncements. Hitler could have found no more fertile ideological ground for absolute allegiance than he in fact had in the Hegelian view of the absolute ethical state, whose laws are the infallible decrees of "ein Volk," combined with the Lutheran concept of law as the product of the divinely ordained state. If the source of laws is sovereign and infallible, then their content is not to be questioned. The people, including most Christians, were well conditioned to accept as valid law whatever came *von oben herab*.

It should give Mennonites some pause to recognize that we have inherited, and still largely share, this Lutheran conception of law as the commands of a divinely ordained state. It suggests that we might also share, more than we wish to admit, the deep-rooted tendency to sacralize the state and accept any of its pronouncements as legally binding. This is at least a logical implication of our concept of law. One need only review the debate on the issue of war tax resistance or other civil disobedience in the church papers to find the prevalent calls to unquestioned obedience to the state, based almost always on Romans 13. Once the narrow blinders of a positivist view of law are discarded, however, it becomes possible to read Romans 13 quite differently. It can be read as affirming *the subordination of the state to law*, so that the state that behaves unlawfully, in violation of God's justice, loses its own legitimacy and authority. Jacques Ellul puts the scriptural view as follows:

The state is created *for the benefit of law* ...Paul states this very clearly in Romans 13:4. The ruler...is the servant of God for man's good. Hence the state does not decide what is good or what is law, but the good

and the law determine the action of the state....Law, rather than¹⁷ the state determines what is good.

The issue of tax resistance is such a divisive and difficult one to resolve because, like most forms of civil disobedience, it places the dissenter in a severe moral dilemma. On the one hand, the law the dissenter chooses to disobey is usually part of a system of law which performs an important moral function in society, and the particular law being broken may do so as well. For example, the tax law provides for the support of education, health and welfare at the same time that it provides for the support of militarism and war. Hence there is strong moral reason to support the law. On the other hand, insofar as the particular law in question is the instrument of a morally otiose *state* policy the only way to withdraw one's own participation in the policy is to disobey the law. In this way civil disobedience often is a terribly morally ambiguous act. It is especially so in the case of war tax resistance, just because the tax law is both moral and immoral. A moral dilemma of this kind is resolved by making a personal decision about which of the conflicting duties is the most important. The more demonic the state policy facilitated by the law the stronger the case for disobedience--and *vice versa*. Sincere conscientious persons may see the balance point at different places. What too often happens in this debate is that the protagonists deny completely the moral considerations on the other side.

Natural law jurisprudence is often charged with being implicitly conservative or even reactionary politically. While it is true historically that natural law doctrine has frequently been used to defend the social status quo, it is also true that it has often been the source of radical critique of state policy. The Enlightenment doctrine of natural rights, especially the right to equal civil liberty, it must be remembered, was a primary impetus for the French and American revolutions. John Locke used the doc-

trine of natural law to justify the Glorious Revolution of 1688 in England. Even the Catholic writer Victoria used the doctrine to call into question the legitimacy of Spanish law in the New World.¹⁹ It must be remembered that the zenith of legal positivism was reached in German jurisprudence in the first half of this century, which left little ground for the moral or the legal criticism of the absolute state. In the concluding section of this paper I argue that we are witnessing in our own day a marriage between legal positivism and minimalist theories of the state that are utilized to support right-wing views of economic and social justice. The positivist bent of traditional Anabaptism makes present-day Mennonites congenial to the minimalist view of the state, just as it has made most of the heirs of the Reformation congenial to this view.

Mennonite theology needs to recognize that the question of the church's relationship to law is not identical with the question of the relationship of the church to the state. One of the strongest pieces of evidence that Mennonite theology has a thoroughly positivist view of law is the fact that nearly every discussion of the Christian use of law is reduced to the issue of church and *state*.

III. Law and the State

Many readers are asking themselves at this point, I am sure, how anyone can be holding out for the moral virtue of law in a time in which law appears to be failing miserably in its traditional task of maintaining a tolerable social order. Everywhere there is talk about the "crisis of law" in our society. Criticism of law and legal institutions is in vogue all across the political spectrum, from extreme right to extreme left.

From the right comes the charge that our society is over-regulated by law, and that "liberals" are unsuccessfully attempting to legislate matters of social attitudes, concern for the poor, and other ideals of social justice which cannot be attained by

legal means. From the left come accusations that law is hopelessly biased in favor of class interests, that it is creating rather than deterring a criminal class, and that it systematically excludes the poor and minorities from the established channels for the redress of grievances. And, from the political "center" come charges that law has become too cumbersome to dispense speedy justice, that society is being paralyzed by the escalation in private suits at law, and that law is being used increasingly to deal with conflicts that ought to be settled in other less adversary ways. Like the weather, law is what everyone talks about, but no one knows what to do about it.

Nevertheless, what appears as a "crisis of law" in our society is not so much a crisis of *law* as it is a deeper crisis of *society*, which neither the political right nor the left is willing or able to see clearly. Nor are they willing to accept the political consequences of the solution. This deeper crisis of society is the disintegration of the moral consensus which is absolutely essential to the maintenance of a stable system of law and hence a just society. Even though it is true that we live in an overly litigious society in which law is being asked to solve social problems it is completely unsuited to solving, it is also true that law is equally unable to perform the functions of social and economic ordering it is well-suited to perform under normal conditions.

The legal positivist doctrine of law, with its view that law accomplishes the task primarily by means of its ability to coerce obedience, gives a false assurance that society can be held together by the force of law, and that a minimally acceptable level of justice can be maintained, even though there is complete moral and religious heterogeneity in the society. Coercive force, in other words, can substitute for moral commitment to the principles and ideals that the law embodies. Contemporary social science, however, is confirming what natural law jurisprudence always claimed: law is most successful in achieving its aims when it merely confirms the already existing

moral intuitions of the people whom it governs. The more the moral consensus of society disintegrates or departs from the norms reflected in law or state policy, the less effective the legal system becomes. Increased severity in criminal punishments does not produce increased deterrence of crime in a society when a significant segment of society has opted out of the value system reflected in that criminal law. Legislation against child abuse, spouse abuse, and sexual harassment will not be effective in a society in which machismo violence and sexism have become widespread values.

This does not mean that laws ought not to be passed against the evils of violence, racism, sexism. Indeed, any just and decent society certainly would have laws and regulations dealing with many aspects of these evils and many others. A society that is *already* concerned about discrimination in employment and education will give evidence of this concern in its laws, as will a society genuinely concerned about pornography, economic and political inequalities, or the protection of the environment. But law cannot substitute for widespread moral concern in these areas. The paradox of law is that it succeeds best when it is needed the least! Order cannot be imposed by law, as "law-'n-order" enthusiasts believe. Law can only confirm and promote an already implicit order. Yet it is just as evident that a just order cannot be maintained without law.

Recognition of this fact helps to shed light on an age-old debate about whether law can or should be used to "enforce morality." Those who say it should be so used usually mean that law ought not to enforce "private"--as opposed to "public"--morality, since if law doesn't enforce the latter it is hard to know just what it does enforce. The distinction between the two is hard to define, however, as is evidenced by the fact that some (the political right) see sexual behaviour, drug use, abortion, and prayer in the schools as "public morality," and racial discrimination in employment and housing as "private morality."

The former they would rigidly legislate, the latter they view as illegitimately "enforcing morality." Of course, the political left sees it just the other way around, and, accordingly, sees legislation in the former case as "enforcing morality" but not in the latter case.

Both sides miss the point. This is not a debate about enforcing (private) morality or not; it is a debate about *whose* morality--whose view of the just and decent society--will be legally enforced. If there is a strong underlying moral commitment in the society to any of these concerns, then law surely can enforce that morality. But if the commitment is lacking, not even the most Draconian legal means will succeed in enforcing the morality. Racial and sexual discrimination can be legislated against; and in a just and decent society it will be. Pornography and violence in the media can also be legislated against. But legislation can never be substituted for the morality itself.

In this respect the view often put forward in conservative theological circles that spiritual conversion must precede legal and political change has a great deal of truth in it. At least such change cannot succeed without moral and spiritual conversion of individuals also taking place. However, it is a fallacy to conclude that conversion is all that is necessary for the realization of a just social order. Moral conversion often needs to be instituted and maintained by law. Further, as long as law does not outrun public morality too far, it can, as even Luther admitted, serve as a moral teacher. It can assist in the process of building moral sensitivities. It cannot be denied, for example, that legislation in the matter of civil rights of minorities over the past twenty years has helped create a wider social sensitivity to the reality of discrimination, even if it has not completely eliminated discrimination. Law cannot substitute for moral persuasion; but neither can moral conversion substitute for law.

The classical liberal vision of the minimal, secular state is being called into serious question by historical events. It is a view of the state that is perfectly complemented by a positivist view of law, even though it had its origins elsewhere. It is a vision of a political community where law intervenes in the lives of people only for the minimal purposes of ensuring their individual rights to security in their person and their property and to equal participation in the political process. In this view of the state the role of law is merely to set those limits on the grand strategy of individualist competition which will permit the "invisible hand" to turn individual egoism into general welfare.

The minimal state does not require a full theory of justice and human community to guide it because it is only a referee in a competitive game played by free and equal individuals. "Equal opportunity"--or maintaining the (at best) theoretical possibility for everyone to "make it," even if not all or only a few can in fact do so--is the fundamental principle in the minimal state. Any more substantive ideals of justice that concern themselves with the conditions for human fulfillment in community with others, with the needs and well-being of those that are not able to "make it" in the free competition, to the minimalist always smell of "big government" and ultimately, tyranny. These concerns are best left to the charitable impulses of private philanthropists and religious groups rather than the coercive reach of the state's laws.

In the minimal state, all matters of morality and religion can be relegated to the sphere of private conscience. Each individual can live according to his or her own principles and ideas; each can follow his or her own god. Taken to its logical extreme it is a view of the political community in which public policy can be made without the aid of subjective, and therefore unreliable, morality. Public policy can be scientific, and therefore objective and "value free." Hence in the minimal state the law can be

neutral on matters of morality as well as religion. It can provide public schools that are supposedly neutral in these matters. It can allocate scarce radio and TV frequencies to news reports, entertainment, and even "religious" programming that is "balanced" (i.e., neutral).

The positivist conception of law serves the minimalist theory of the state well. It promises a law that can hold this neutral, secular state together in the absence of any moral or spiritual consensus. It has no need of morality, since law can perform its ordering function on the strength of its sheer power to threaten and carry out sanctions against those who would violate the rules of the game. Force, or the threat of force, is all that is needed to ensure the ordered, if not the fully just, society.

It should now be clear why Mennonites throughout their history have been drawn to minimalist, libertarian politics. They have demonstrated this in the choice of countries to which they immigrate. Their overwhelming sympathy for Republican party politics in the United States is well-documented, and follows a similar pattern in the more complex party politics of Canada. There are some very good reasons for this. Minimal libertarian states have been far more tolerant of religious minorities, for the very reasons outlined earlier. The sectarian, understandably, will always feel safer in the state that professes religious neutrality.

But the reasons for Mennonite sympathy for the minimalist, libertarian state go even deeper. The positivist conception of law that we inherit from Lutheran Protestantism makes us, as it makes most Protestants, sceptical of law that claims moral purposes and moral foundations. That the state's functions are directly ordained we are willing to accept. That its law properly functions to maintain and nourish a moral community of which we too are a part we are far less willing to accept. That the church too needs law (and sanctions) is inconceivable, for, as

we know, law is "outside the perfection of Christ." The minimal state allows, indeed depends upon, the church to attend to the needs of the poor, the sick, and the alienated. Mennonites like that arrangement because it fits well our belief that these are proper functions of the agapeistic community rather than policies of the state. We do not like to consider the possibility that the policies of state may be providing us with the victims we need for the exercise of our charity, or that law too could help heal the sick, feed the hungry and free the captives. What *would* become of the Mennonite Central Committee in a society that did these things by law?

If, in fact, the present crisis of law in our society is a demonstration of the impoverishment of a social order attempting to survive by the mere threat of force and violence, without a law founded upon a moral consensus, this presents serious issues for the church to address. If law requires a moral foundation, where does the church stand with respect to that morality? Does it support and participate in the building of a public morality that makes justice possible? Can the church retain a prophetic stance while at the same time participating in the various systems of economic, professional, and political life defined as they are by law?

Most importantly, should Mennonites continue to protect their own religious liberty in the society by embracing, as we generally do, the libertarian view of state with its attendant minimal, laissez-faire view of social justice and law? Is this too great a moral price to pay for religious acceptance? Is it possible that the case for the religious liberty can be made on grounds other than those of the morally neutral, secular state, which recognizes the moral function of just law and the necessity of a moral foundation for law in society?

Despite the present political preoccupation with the theory of the minimal state in the United States and one or two other declining Western empires, the

signs seem clear that it is a last hurrah for a politics and a jurisprudence that are demonstrating their own inability to establish order, to say nothing of basic justice. The use of law to regulate the use and distribution of resources, the preservation of the natural and social environment, use of communications media, and a host of other aspect of complex technological societies is simply inevitable. Yet without the building of a moral foundation under this regulated society the result will be only tyranny maintained by brutal repression. This is the lesson to be learned from the other side of the political spectrum in the Soviet Union and its unfortunate puppet regimes.

Where do Christians, especially Mennonites, fit in this emerging picture? This is a question still to be answered. My only certainty is that we can no longer stake our case on a view of law and society outrun by history. One of the most significant developments of our day is the emergence within the mainstream of conservative, evangelical Protestantism of this same realization. The "Moral Majority" movement has yet to recognize the radical implications of its own insistence upon the political and social implications of the Christian Gospel and the necessity for restoring the moral foundation of law in society. The very recognition that law requires this foundation undercuts the right-wing politics of the minimal state. In recognizing that law cannot be morally neutral, they undermine the grounds for their own denial that law should pursue the full demands of justice.

Law and morality are mutually dependent. This does not mean that law is necessarily moral, only that it reflects some morality or other. It may reflect the most perverse and demonic morality, and it often does so. But law is not amoral. Where it is corrupt or demonic, then insofar as one has to live one's life by that law one must as a Christian work for the building of a new moral order that will make possible just law. The place to begin this building is within the community of believers itself, which can also

create its own law, for law is not always and only the creation of states. Only within the church can law reflect the full ideals of Christian love and justice, but this ethic of the church should also provide guidance for the law of the state. It should do so because as Christians we do, as Luther knew, live in both kingdoms. But both are orders of law and of morality.

FOOTNOTES

1. Jacques Ellul, *The Theological Foundation of Law* (New York: Seabury Press, 1969), pp. 18, ff.
2. *Ibid.*, pp. 37, 68 ff.
3. Perhaps God could do so on a "divine command" theory of morality. The strangeness of the idea of God *changing* moral rules, however, suggests the inadequacy of a "divine command" theory of morality. Many moral philosophers and theologians find a violation of the very ideas of morality implicit in the concept of something being morally right or wrong, good or bad, merely because God, for no *reason*, decrees it.
4. See H. L. A. Hart, *The Concept of Law* (London: Oxford U. Press), pp. 169-76.
5. Ellul, *op. cit.*, p. 19.
6. Augustine, *City of God*, Boork IV, 4.
7. Aquinas, *Summa Theol.*, 1a, 2ae, 95, 2.
8. John Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld & Nicolson, 1955). Book VI, p. 185.
9. *Ibid.*
10. H. L. A. Hart, *op. cit.*, pp. 181ff.
11. Two modern antagonists in this debate are Lon Fuller and H. L. A. Hart. See the latter's "Positivism and the Separation of Law and Morals," and the former's "Positivism and Fidelity to Law-- A Reply to Professor Hart." in 71 *Harvard Law Review* 593 (Feb. 1958).
12. Austin, *op. cit.*, p. 184.

13. Hart, *op. cit.*, p. 203.
14. "Legal norms may have any kind of content."
J. C. Gray, *The Nature and Sources of Law* (1902),
S. 213.
15. Pilgram Marpeck, "Explanation of the Testaments"
and "Defence" in Walter Klaassen (ed.), *Anabaptism
in Outline* (Scottsdale: Herald Press, 1981),
pp. 262-63.
16. Ellul, *op. cit.*, p. 126.
17. *Ibid.*, p. 123-24.
18. David A. J. Richards, *The Moral Criticism of
Law* (Encino: Dickenson Publishing Co., 1977),
pp. 9-10.

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